Supreme Court, U.S.
FILED
AUG 26 1987
JOSEPH F. SPANIOL, JR.
CLERK

87-326

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

G. D. SEARLE & CO.,

Petitioner,

v.

DEBRA A. and GEORGE SIMON, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

LAURA A. KASTER *
ROSS B. BRICKER
HOWARD S. SUSKIN
VILIA M. DEDINAS
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350
Attorneys for Petitioner

Of Counsel:

GREGORY L. WILMES
FRUTH & ANTHONY, P.A.
1350 International Center
900 Second Avenue South
Minneapolis, Minnesota 55402
(612) 349-6969

* Counsel of Record

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED

1. Whether, in pending mass tort litigation, lawyers coordinating the claims of many plaintiffs are entitled to discover a defendant's overall estimate of the litigation reserves needed to settle and defend claims where that reserve estimate is based on the defendant's attorney's assessment of the settlement value and anticipated litigation expenses of individual plaintiff's claims.

2. Whether defendants forced into mass tort litigation may have their business redefined by a court as the "business of litigation" and thereby lose the work product and attorney-client privilege protections routinely afforded other less frequently sued defendants.

LIST OF PARTIES

The parties to the consolidated proceeding in the United States Court of Appeals for the Eighth Circuit, *Simon, et al. v. G. D. Searle & Co.*, No. 85-5334 MN, were G. D. Searle & Co., as appellant, and the following individuals, as appellees: Gail Olsby Bendt; Erica Jepson; Vicki Jepson; Walter Jepson; Carolyn Jewell; Kim M. Eisen; Deena L. Meyer; Theresa M. Schrader; Rolfe E. Schrader; Patricia LaVoie; Steve LaVoie; Susan J. Haug; Dennis Haug; Valerie P. Heller; Phillip M. Heller; Joanne Sobelman; Gerald Sobelman; Nancy L. Norring-Heyer; Douglas Heyer; Pamela J. Schmahl; Debra Crusoe; Gary Crusoe; Sandra Leigh Eggen; Kathleen Friedrich; Barbara J. Benson; Cheryl Stevenson; Denise O. Murray; Tammy Jacobs; Esther R. Kociemba; William J. Kociemba; Joan Timmerman; Gregory Timmerman; Alana Perper; Alan Perper; Romalynn P. Shreve; Robert Curtis Shreve; Bonnie Larson-Esswein; Bonnie Smith; Laura Robertson; Linda Vanderhaven; Debra Gambucci Stone; Darla Tesmer; Karen Ann Klempka; Anne Gamache; Rozanne Nelson; Amber Morgan; Sandra McNeill; Amy Alexy Bigelow; Rochelle Coleman; Connie Lynn Fallen; Daniel Fallen; Susan Lynch; Lisa Ann Larson; Sharon Wilson; Nancy Lundein; Paula Otterson; Gail Schendel; Kathryn Gregory; Anne Kivela; Ruth Hoppe; and Rose Mary Philippi.

Accordingly, the aforementioned appellees are also respondents to this Petition.

RULE 28.1 LISTING

The list required by Supreme Court Rule 28.1 is furnished in Appendix H. (App. 42.)

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
RULE 28.1 LISTING	iii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	2
STATUTES AND RULES INVOLVED	2
STATEMENT OF THE CASE	3
Background	3
The Individual and Aggregate Case Reserves	4
The Special Master's Findings	6
The Eighth Circuit's Opinion	7
REASONS FOR GRANTING THE WRIT	10
A. THE EIGHTH CIRCUIT'S RULING IN THIS CASE CONFLICTS WITH *HICKMAN v. TAYLOR* AND *UPJOHN CO. v. UNITED STATES* AND DECISIONS OF FIVE CIRCUIT COURTS OF APPEALS	12
B. THE EIGHTH CIRCUIT'S DECISION TO DENY ATTORNEY-CLIENT PRIVILEGE BECAUSE THE DOCUMENTS ARE NOT SUFFICIENTLY REVEALING CONFLICTS WITH HOLDINGS OF OTHER COURTS	19

C. THE EIGHTH CIRCUIT'S RULING THAT BOTH THE WORK PRODUCT DOCTRINE AND ATTORNEY-CLIENT PRIVILEGE ARE VITIATED WHEN DOCUMENTS ARE USED FOR BUSINESS PURPOSES DIRECTLY CONFLICTS WITH THE NINTH CIRCUIT'S RULING IN *IN RE GRAND JURY WITNESS (SALAS)* 20

CONCLUSION 24

APPENDIX

APPENDIX A – Opinion of the United States Court of Appeals for the Eighth Circuit, April 13, 1987 ..... App. 1

APPENDIX B – Order of the United States Court of Appeals for the Eighth Circuit, July 7, 1987, Denying Petition for Rehearing ..... App. 24

APPENDIX C – Order of the United States District Court for the District of Minnesota, June 7, 1985 ..... App. 25

APPENDIX D – Report (I) of Special Master, August 22, 1984 ..... App. 27

APPENDIX E – Report (II) of Special Master, September 17, 1984 ..... App. 35

APPENDIX F – Report (III) of Special Master, July 11, 1985 ..... App. 38

APPENDIX G – Order of the United States Court of Appeals for the Eighth Circuit, July 30, 1987, Granting G.D. Searle's Motion for a Stay of Mandate Pending a Filing of a Petition for a Writ of Certiorari .... App. 41

APPENDIX H – Rule 28.1 Listing ..... App. 42

TABLE OF AUTHORITIES

Cases	PAGE
Coleman v. American Broadcasting Companies, Inc., 106 F.R.D. 201 (D.D.C. 1985)	22
Diversified Industries, Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977)	19
Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 509 F.2d 730 (4th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975)	12, 14
Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971)	19
Hickman v. Taylor, 329 U.S. 495 (1947)	12, 13, 18, 23
In re "Agent Orange" Product Liability Litigation, 100 F.R.D. 718 (E.D.N.Y. 1983), *mandamus denied sub nom. In re Diamond Shamrock Chems. Co.*, 725 F.2d 858 (2d Cir.), *cert. denied*, 465 U.S. 1067 (1984)	17
In re Ampicillin Antitrust Litigation, 81 F.R.D. 377 (D.D.C. 1978)	19
In re Beef Industry Antitrust Litigation, 607 F.2d 167 (5th Cir. 1979), *cert. denied*, 452 U.S. 905 (1981)	17
In re Grand Jury Witness (Salas), 695 F.2d 359 (9th Cir. 1982)	19, 20, 22
In re International Systems & Controls Corp. Securities Litigation (Koenig), 693 F.2d 1235 (5th Cir. 1982)	12, 14
In re LTV Securities Litigation, 89 F.R.D. 595 (N.D. Tex. 1981)	22
In re Sealed Case, 676 F.2d 793 (D.C. Cir. 1982)	12, 14

In re Special September 1978 Grand Jury, 640 F.2d 49 (7th Cir. 1980) 12, 14

In re Witness Before The Special March 1980 Grand Jury, 729 F.2d 489 (7th Cir. 1984) ... 19, 20, 22

Mead Data Central, Inc. v. U.S. Dept. of Air Force, 566 F.2d 242 (D.C. Cir. 1977) 19

Natta v. Hogan, 392 F.2d 686 (10th Cir. 1968) .. 19

Omaha Public Power District v. Foster Wheeler Corp., 109 F.R.D. 615 (D. Neb. 1986) 14

Real v. The Continental Group, Inc., No. C-83-2871, Slip op. (N.D. Cal. November 10, 1986) 22

Reichenbach v. Smith, 528 F.2d 1072 (5th Cir. 1976) 23

SCM Corp. v. Xerox Corp., 70 F.R.D. 508 (D. Conn.), *appeal dismissed*, 534 F.2d 1031 (2d Cir. 1976) 22

Sporck v. Peil, 759 F.2d 312 (3d Cir.), *cert. denied*, 106 S. Ct. 232 (1985) 12, 14, 15

Tronitech, Inc. v. NCR Corp., 108 F.R.D. 655 (S.D. Ind. 1985) 22

Upjohn Co. v. United States, 449 U.S. 383 (1981) 12, 13, 14, 15, 18

U.S. v. Cuthbertson, 651 F.2d 189 (3d Cir.), *cert. denied*, 454 U.S. 1056 (1981) 19

U.S. Dept. of Energy v. Crocker, 629 F.2d 1341 (Em. Ct. App. 1980) 19

U.S. v. United Shoe Machinery Corp., 89 F. Supp. 357 (D. Mass. 1950) 19

Ward v. Ford Motor Co., 93 F.R.D. 579 (D. Colo. 1982) 16

Statutes

Fed. R. Civ. P. 26(b)(2) 15

Fed. R. Civ. P. 26(b)(3) ..... *passim*

Other Authorities

Admin. Off. of U.S. Cts., 1985 Ann. Rep. of the Director of the Admin. Off. of the U.S. Cts. .. 11

Admin. Off. of U.S. Cts., 1984 Ann. Rep. of the Director of the Admin. Off. of the U.S. Cts. .. 11

Admin. Off. of U.S. Cts., 1983 Ann. Rep. of the Director of the Admin. Off. of the U.S. Cts. .. 11

Comment, *Issues in Asbestos Litigation*, 34 Hastings L.J. 871 (1983) 23

Cooper, *Work Product of the Rulesmakers*, 53 Minn. L. Rev. 1269 (1969) 18

J. Kakalik, P. Ebener, W. Felstiner, M. Shanley, *Costs of Asbestos Litigation*, (1983) (published by Rand Corp. Inst. for Civ. Just.) 23

Lawyers Who Won Verdicts in Rely Trials Are Selling Their Evidence Angering P & G, Wall St. J., 1982 17

Note, *Seattle Times: What Effect on Discovery Sharing?*, 1985 Wisc. L. Rev. 1055 (1985) ... 16

Ranii, *How the Plaintiff's Bar Shares Its Information*, Nat'l L.J., July 23, 1984 17

Rheingold, *Mass Disaster Litigation and the Use of Plaintiffs' Groups*, Litigation, Spring, 1977 . 16

Rubin, *Mass Torts and Litigation Disasters*, 20 Ga. L. Rev. 429 (1986) 23

In The

Supreme Court of the United States

October Term, 1987

G. D. SEARLE & CO.,

Petitioner,

v.

DEBRA A. and GEORGE SIMON, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

G. D. Searle & Co. ("Searle") respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The Eighth Circuit's opinion is reported at 816 F.2d 397 and is set forth in Appendix A. (App. 1.) The Eighth Circuit's denial of rehearing en banc by a five to five vote is not reported and is set forth in Appendix B. (App. 24.) The order of the United States District Court for the District of Minnesota adopting the findings of the special master is not reported and is set forth in Appendix C.

(App. 25.) The reports of the special master are not reported and are set forth in Appendices D, E and F. (App. 27—App. 40.) The Eighth Circuit's order granting Searle's motion to stay the mandate pending its filing of this petition for a writ of certiorari is set forth in Appendix G. (App. 41.)

JURISDICTION

This case was certified to the United States Court of Appeals for the Eighth Circuit pursuant to 28 U.S.C. § 1292(b). On April 13, 1987, the Eighth Circuit entered judgment by divided vote. On July 7, 1987, Searle's petition for rehearing en banc was denied by an evenly divided court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTES AND RULES INVOLVED

Federal Rules of Civil Procedure, Rule 26(b)(3):

> Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to

obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

STATEMENT OF THE CASE

Background

This case arises out of coordinated mass tort litigation relating to Searle's manufacture of the copper intrauterine contraceptive known as the Cu-7 IUD. Searle developed and tested the Cu-7 as a prescription drug in compliance with Food and Drug Administration regulations.

Approximately 480 individual product liability lawsuits relating to the Cu-7 are now pending against Searle. Fourteen trials have begun: eight trials resulted in jury verdicts in favor of Searle; one resulted in a voluntary dismissal after one and one-half weeks of trial; one settled after two days of trial; one, involving 17 consolidated actions, resulted in a directed verdict in favor of Searle which has been affirmed on appeal; and in one a mistrial was declared during voir dire and the case is scheduled to be retried. Only two cases resulted in verdicts in favor of the plaintiffs.

Forty-nine of the pending Cu-7 product liability cases were consolidated for discovery in the federal district court in Minnesota before Judge Miles W. Lord. (App. 2.) In July 1983, Judge Lord entered an order requiring Searle to produce "each and every document contained

in its files which relates to the Cu-7 IUD" and making all discovery against Searle in these cases available to all Cu-7 plaintiffs around the country. (App. 2.) The plaintiffs in these cases and those pending elsewhere have coordinated their discovery efforts and their nationwide litigation and settlement strategy. Plaintiffs' lead counsel in the Minnesota consolidated actions has sought to act as a clearinghouse for discovery against Searle and actively participates in the Cu-7 Litigation Steering Committee of the American Trial Lawyers Association.

Searle has complied with massive discovery requests and provided plaintiffs with information relating, among other things, to Searle's finances, and the dollar value of actual settlements in individual Cu-7 cases. (Affidavit of Thomas L. Bose, June 8, 1984, ¶ 9.) Searle objected when the plaintiffs also sought to obtain Searle's opinion of the projected aggregate value of all Cu-7 litigation.

This petition seeks review of the split decision of the Eighth Circuit denying Searle work product protection and attorney-client privilege for certain documents which reflect Searle's attorneys' estimates of individual case reserves and aggregate case reserves. These reserves were prepared by counsel in response to a specific request for legal advice by Searle and reflect Searle's attorneys' conclusions as to Searle's potential exposure in individual Cu-7 lawsuits and its total exposure. (*See, e.g.*, Affidavit of Roger C. Thies, April 6, 1984, ¶¶ 3, 6, 8.)

The Individual and Aggregate Case Reserves

When a Cu-7 claim or lawsuit is received by Searle, Searle requests that one of its attorneys set a case reserve. The case reserve is an estimate made by the at-

torney of the probable defense expense or "value" of the case. The reserve reflects the attorney's opinion as to anticipated legal expenses and potential settlement value given the particular type of alleged injury, geographic considerations, and other factors. (App. 6.) The individual case reserves are revised from time to time, based upon developments in individual cases. (Bose Affidavit, ¶¶ 5, 8.)

Searle's internal risk management department, in close consultation with counsel and Searle's insurers, uses the individual case reserves to project the aggregate or overall reserve that Searle will need to finance the defense and settlement of current and anticipated Cu-7 cases. To ascertain the aggregate reserve, the risk management department and Searle's counsel consider the individual actual case reserves set by counsel, the number of past claims, accuracy of past projections compared to actual expenses, increase or decrease in number of products in use, and the attorneys' opinions concerning the "litigation climate." (Affidavit of Eugene W. Bader, June 8, 1984, ¶ 9.) Many of the risk management department's documents also contain an average case reserve for the Cu-7 cases, which is derived by dividing the aggregate reserve by the number of outstanding Cu-7 cases. Searle's risk management group performs various calculations with the compiled reserve data to assist Searle's senior management in tracking, controlling, and planning for the costs of Searle's Cu-7 litigation. These financial planning documents, which use and reflect the case reserves and are based upon extensive discussions with counsel, are also at issue in this case. (*See* Bader Affidavit, ¶ 14.)

Reserve information is treated as highly confidential within Searle, and access to the data is restricted to

Searle's attorneys and risk management personnel and insurers with a "need to know." No financial report or any other document available to the public contains reserve information broken down according to product line or specific claim. (Bader Affidavit, ¶ 6.)

In supporting its assertion of attorney-client privilege and work product protection before the special master, Searle submitted lists describing the documents as to which Searle asserted privilege or work product protection and affidavits describing the authors, recipients, and purposes of the documents. (App. 27.) Searle also furnished selected documents under seal for an *in camera* inspection. (App. 27, 28, 35.)

The Special Master's Findings

The special master appointed by the district court to supervise discovery in the consolidated Cu-7 cases specifically found that individual case reserves were protected by the work product doctrine and the attorney-client privilege. (App. 30, 32.) The special master recognized that "[i]t would be unfair for a plaintiff to know how her particular case was assessed by Searle's lawyers." (App. 30.) The special master also found that the aggregate reserves were based upon specific case reserves, stating that "[s]ince the documents reveal aggregate case reserves and average case reserves, they reveal to some extent the methodology for setting case reserves." (App. 39.) Moreover, the special master acknowledged that "[p]laintiffs could take an aggregate reserve and determine an average reserve per case, which arguably gives plaintiffs some insight into Searle's attorneys' thought processes of setting reserves." (App. 31.)

Despite these findings, the special master held that documents revealing aggregate or average reserve information for the Cu-7 lawsuits were discoverable. The special master concluded that the aggregate and average case reserves were "prepared by corporate officials for business purposes such as budgeting questions, profitability analysis, and insurance needs," and that the work product doctrine "does not protect these business documents reflecting discussions among corporate officers . . . even if the discussions are based in part on information generated by litigation." (App. 30.) The special master failed to require that the plaintiffs make any showing that the documents were relevant or that the plaintiffs had any special need for the documents.

Finally, the special master did not consider that the documents were privileged because they reflected privileged attorney-client communications. Rather, the special master held that "those documents from one corporate officer to another with a copy sent to an attorney do not qualify as attorney client communications." (App. 31-32.)

The district court adopted the special master's report and granted Searle's request for certification pursuant to 28 U.S.C. § 1292(b).

The Eighth Circuit's Opinion

Although the Eighth Circuit recognized that Searle's case reserves would afford plaintiffs "nothing in the way of admissible evidence on the issue of liability or on the issue of damages, either compensatory or punitive," it nevertheless affirmed the district court's order by divided vote. (App. 15.)

The majority thought that the aggregate case reserve "serves numerous business planning functions, but [could

not] see how it enhances the defense of any particular lawsuit." (App. 8.) The majority concluded that "Searle's business involves litigation, just as it involves accounting, marketing, advertising, sales, and many other things," and that the documents therefore should be deemed to be ordinary business documents subject to discovery. (App. 8.) In so ruling, the majority ignored the special master's factual finding that the aggregate and average case reserves revealed "to some extent" the methodology of Searle's attorneys in setting the case reserves and that they give "some insight" into Searle's attorneys' thought process. Instead, the majority found that "when gathered into the aggregates no identifiable opinion work product remains" (App. 9 n.3), and that "the individual case reserve figures cannot be traced or inferred from the aggregate information." (App. 11 n.6.)

The court similarly rejected Searle's claim that the documents were shielded from discovery by the attorney-client privilege. Although acknowledging that "[t]he risk management documents reflect attorney-client communications running in two directions" (App. 10), the court declined to accord them protection. The court did "not believe that the aggregate information discloses the privileged communications . . . to a degree that makes the aggregate information privileged." (App. 11.)

In his dissent, Judge Gibson noted "a deep inconsistency" in the majority's "protecting the parts but determining that the sum of the parts and calculations based upon the protected figures are not protected." (App. 15.) Judge Gibson observed that "within the increasingly common context of mass products liability litigation, the aggregate and average figures may take on even greater significance." (App. 21.) Judge Gibson reasoned: "Just as a specific reserve figure gives an opponent an unfair advantage

in settlement negotiations, an aggregate reserve figure would give attorneys representing a group of opponents an equally unfair advantage." (App. 21.)

Judge Gibson also objected to the majority's failure to recognize that the opinion work product doctrine "gives virtually absolute protection to both the mental impressions of Searle's attorneys—as contained in the specific case reserve figures and necessarily reflected in the risk management documents—and the mental impressions of Searle's representatives, as contained in the risk management reports." (App. 16.)

Finally, Judge Gibson recognized that the majority's finding that Searle's business is litigation, "confronts Searle with a dilemma of Catch-22 proportions: if Searle were not involved in litigation, Rule 26(b)(3) would have no application, but because Searle is involved in litigation, the ordinary course of business exception applies. Thus, litigation, the event that triggers application of the rule, also triggers application of the exception." (App. 21.)

On April 27, 1987, Searle petitioned the Eighth Circuit for a rehearing en banc. Five judges voted to grant Searle's request and five judges voted to deny rehearing. Because a majority of the Eighth Circuit did not support a rehearing en banc, Searle's petition was denied. (App. 24.) On July 30, 1987, the Eighth Circuit stayed the mandate pending this Court's ruling on the petition for a writ of certiorari. (App. 41.)

REASONS FOR GRANTING THE WRIT

In coordinated mass tort litigation, the aggregate and average case reserves, figures which are purely the opinion of the defendant and his attorneys as to the projected cost and settlement value of all of the cases pending against him, are precisely as sensitive as individual case reserves in individual cases. Forced exposure of these figures to a coordinated plaintiffs bar will intrude on the thought processes of the defendant and his attorneys and give the plaintiffs unfair leverage in any negotiations aimed at settling these cases as a group. Moreover, disclosure of the aggregate information will allow the plaintiffs to derive individual average values for the cases which will then become a floor for settlement in each case.

The illogic of the divided Eighth Circuit opinion is that a defendant who is sued by only one or two plaintiffs will have greater protection than the beleaguered defendant sued by many plaintiffs. The defendant with only a few opponents will be protected from disclosure of his attorney's estimate of the value of the case; but the defendant facing a coordinated plaintiffs bar in multiple cases will have to reveal his attorneys' opinion about the aggregate value of his cases.

This petition therefore raises substantial issues concerning the application in mass tort litigation of the federal policy favoring frank discussions between attorneys and clients on the issue of settlement and litigation strategy and the doctrines that enforce this policy, the attorney work product doctrine and the attorney-client priv-

ilege. This issue is urgent; mass tort litigation is growing at an exponential rate in this country.[1]

The Eighth Circuit's ruling dramatically departs from the mandate of Rule 26(b)(3), requiring special protection for attorneys' opinions. In addition, the Eighth Circuit majority improperly considered the degree to which documents reflect work product or privileged communications, in direct conflict with the teachings of this Court and the decisions of other Circuit Courts of Appeals. Finally, the Eighth Circuit's ruling that both work product and attorney-client privileged documents lose their protected status when they are also used for a "business purpose" works a gross injustice on individuals and corporations faced with numerous cases. Under the Eighth Circuit ruling, defendants forced into mass tort litigation may have their businesses redefined by a court as the "business of litigation" and thereby lose the protection routinely afforded other less frequently sued defendants.

The Eighth Circuit's decision threatens to erode the attorney-client relationship and chill litigants from consid-

---

[1] The issues raised by this petition affect tens of thousands of lawsuits that have assumed the sobriquet "mass tort." Mass tort cases include cases arising out of mass accidents and products liability cases filed by persons located all over the country. In the five years between 1978 and 1983, the number of products liability cases, the greatest single group of mass tort cases, filed in federal courts more than doubled, and at least ten thousand new cases are likely to be filed each year. *See* Admin. Office of U.S. Cts., 1983 Ann. Rep. of the Director of the Admin. Off. of the U.S. Cts., 122, 129-31. The number of products liability cases filed in federal district courts increased another 20.6% between 1983 and 1984. Admin. Off. of U.S. Cts., 1984 Ann. Rep. of the Director of the Admin. Off. of the U.S. Cts., 131. In 1985, the number of such cases increased by an additional 27%. Admin. Off. of U.S. Cts., 1985 Ann. Rep. of the Director of the Admin. Off. of the U.S. Cts., 138.

ering all the factors that bear on a decision to try or settle lawsuits. It is precisely this danger that the work product doctrine and the attorney-client privilege are intended to prevent. The Eighth Circuit's divided decision so far departs from the rationale of these doctrines and the prior rulings of this Court that review by this Court is warranted. This Court should grant certiorari and set this case down for plenary consideration.

A.

THE EIGHTH CIRCUIT'S RULING IN THIS CASE CONFLICTS WITH *HICKMAN v. TAYLOR* AND *UPJOHN CO. v. UNITED STATES* AND DECISIONS OF FIVE CIRCUIT COURTS OF APPEALS.

The Eighth Circuit's failure to recognize the need to protect aggregate case reserve information in mass tort cases directly conflicts with this Court's teachings in *Hickman v. Taylor*, 329 U.S. 495 (1947), and *Upjohn Co. v. United States*, 449 U.S. 383, 401-02 (1981), and with the holdings of the United States Court of Appeals for the District of Columbia, and the Third, Fourth, Fifth and Seventh Circuits. *See In re Sealed Case*, 676 F.2d 793 (D.C. Cir. 1982); *Sporck v. Peil*, 759 F.2d 312 (3d Cir.), *cert. denied*, 106 S. Ct. 232 (1985); *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730 (4th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975); *In re International Systems & Controls Corp. Securities Litigation (Koenig)*, 693 F.2d 1235 (5th Cir. 1982); *In re Special September 1978 Grand Jury*, 640 F.2d 49 (7th Cir. 1980). Each of these cases holds that material reflecting an attorney's mental impressions, conclusions, judgments or legal theories is accorded special, nearly absolute protection from discovery. *See* Fed. R. Civ. P. 26(b)(3).

In *Hickman v. Taylor*, this Court initially recognized the importance of protecting the tangible and intangible materials which reflect a lawyer's proper preparation of a client's case. Such preparation requires a lawyer to "assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." 329 U.S. at 511. Indeed, this Court cautioned that,

> Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Id.

In *Upjohn*, Chief Justice Rehnquist, writing for a unanimous Court, stressed the importance of according "special protection to work product revealing the attorney's mental processes." 449 U.S. at 400. The *Upjohn* trial court had directed production of an attorney's notes and memoranda of oral interviews with witnesses. The trial court applied the standards applicable to fact work product, and required the plaintiff to demonstrate that he had a "substantial need" for the material and would be unable to obtain the substantial equivalent of the materials by other means "without undue hardship." Reversing, the Supreme Court held that the material was opinion work product deserving special protection. 449 U.S. at 441.

In *Upjohn*, this Court recognized that the Courts of Appeals were divided as to whether any showing of necessity could ever overcome the protection afforded opinion work product. The Court stated:

> While we are not prepared at this juncture to say that such material is always protected by the work-product rule, we think a far stronger showing of necessity and unavailability by other means than was made by the Government or applied by the Magistrate in this case would be necessary to compel disclosure.

449 U.S. at 401-02.

Since *Upjohn*, the Courts of Appeals have accorded work product material nearly absolute protection. *See, e.g., Sporck*, 759 F.2d at 316 (3d Cir. 1985) ("almost absolute protection"); *Koenig*, 693 F.2d at 1240 (5th Cir. 1982) (noting that courts have "provided an almost absolute protection for such materials"); *In re Sealed Case*, 676 F.2d at 810 (D.C. Cir. 1982) (extraordinary justification is required to overcome work product protection); *In re Special September 1978 Grand Jury*, 640 F.2d at 63 (7th Cir. 1980) (extraordinary need must be shown); *Duplan Corp.*, 509 F.2d at 734 (4th Cir. 1974) ("no showing of relevance, substantial need or undue hardship should justify compelled disclosure" of opinion work product). Information which reveals much less about an attorney's thought processes than the value of cases has been held to be highly protected opinion work product. For example, the Third Circuit, following *Upjohn*, has precluded discovery of documents collected by an attorney to prepare a client for a deposition because the selection process itself could reveal counsel's mental impressions and legal opinions on the issues and defenses in litigation. *See Sporck*, 759 F.2d 312 (3d Cir. 1985); *accord Omaha Public Power District v. Foster Wheeler Corp.*, 109 F.R.D. 615 (D. Neb. 1986).

Searle's case reserves are the paradigm of opinion work product and therefore merit even greater protection than the material in either *Upjohn* or *Sporck*. As Judge Gibson's dissent recognized, the calculation of case reserve figures, requiring the attorney to weigh and evaluate the merits of a case, involves a substantially more complex legal judgment than that involved when an attorney selects relevant and material documents. (App. 18.) Searle's aggregate and average reserve figures for the Cu-7 litigation not only give "some insight" into the mental processes involved in setting a specific case reserve and reveal Searle's methodology for setting case reserves, as the special master found (App. 31, 39), they give undiluted insight into Searle's counsels' view of their projected total litigation costs. A lawyer must combine expertise and knowledge in order to project an estimate of the value of a legal claim and the fees and expenses that may be incurred. This effort requires the lawyer to assess the evidence and the legal issues involved and to evaluate the case's strengths and weaknesses. The result is pure opinion expressed in a dollar figure.[2]

The plaintiffs already have access to all actual settlement figures. (App. 31.) Searle has answered interrogatories

---

[2] Because they are only opinion, Searle's aggregate and average case reserve documents are fundamentally different from insurance documents. Insurance documents covered by Rule 26(b)(2) reveal factual information, *i.e.*, a defendant's maximum coverage. They do not reveal attorneys' estimates of potential liability. The plaintiffs already have had access to Searle's information revealing the amount for which Searle has settled cases similar to theirs. Therefore, the discovery contemplated by Rule 26(b)(2), which permits insurance discovery, has been accomplished here and is not in dispute. Unlike documents reflecting the amount for which a defendant is insured, the risk management documents reveal the value which Searle's attorneys have projected for the Cu-7 cases.

providing this information. (App. 31; Bose Affidavit, June 8, 1984, ¶ 9.) Searle's attorneys' projection of the worth of these cases has no factual component which plaintiffs have been denied.

The damaging effect of removing work product protection for aggregate case reserves is particularly acute in the context of mass tort litigation. Just as a specific reserve figure gives an opponent an unfair advantage in settlement negotiations in an individual case, an aggregate reserve figure gives attorneys representing a group of opponents an equally unfair advantage. In addition, mass tort plaintiffs can take the aggregate reserve data, divide it by the number of cases and use the resulting figure to establish minimum settlement amounts.

Sharing of discovery information and settlement strategy is the signal characteristic of mass tort litigation. In mass tort cases, individual plaintiffs typically form a coordinating committee that conducts discovery which is then shared with all participating plaintiffs.[3] In this case, Robins, Zelle, Larson & Kaplan, the Minnesota Cu-7 plaintiffs' lead counsel, has not only coordinated discovery here, it has sold packages of discovery materials and has even sought relief in a non-Minnesota case to prevent a plaintiff from

[3] There has been shared discovery in some widely publicized cases, including the lawsuits involving the Dalkon Shield, the Chevrolet motor mount failure litigation, and the diethylstilbestrol, Aralen, and MER/29 drug cases. *See* Rheingold, *Mass Disaster Litigation and the Use of Plaintiffs' Groups*, Litigation, Spring, 1977 at 18-19. Discovery sharing is also accomplished through information exchanges such as "The ATLA Exchange" operated by the Association of Trial Lawyers of America. *See* Note, *Seattle Times: What Effect on Discovery Sharing?*, 1985 Wis. L. Rev. 1055, 1057-58 n.14 (1985). *See also Ward v. Ford Motor Co.*, 93 F.R.D. 579 (D. Colo. 1982) (discovering party admitted his plans to add discovered information to the Attorneys Information Exchange Group information pool).

getting Searle documents directly from Searle rather than paying Robins, Zelle for it. (Weinstein Affidavit and Exhibits.)[4]

Class actions have been certified in mass tort cases pursuant to the federal policy favoring global settlements of litigation.[5] In certified cases, it cannot be disputed that knowledge of aggregate and average reserve information would give the coordinated plaintiffs bar unfair insight into the defendant's attorneys' thought process precisely in a way both the Eighth Circuit and the magistrate held was improper as to individual case reserves in individual cases.

In adopting Rule 26(b)(3), the Advisory Committee observed that the required special showing to permit access to trial preparation materials "reflects the view that each side's informal evaluation of its case should be protected, that each side should be encouraged to prepare independently, and that one side should not automatically have the benefit of the detailed preparatory work of the other side." Allowing Searle's litigation adversaries access to

---

[4] *See generally* Ranii, *How the Plaintiff's Bar Shares Its Information*, Nat'l L.J., July 23, 1984, at 1, col. 3; *Lawyers Who Won Verdicts in Rely Trials Are Selling Their Evidence Angering P & G*, Wall St. J., December 20, 1982, at 19, col. 4 (Denver firm purchased the rights to discovered information from its clients and created handbooks selling for $1,000 each).

[5] Cases that have been consolidated for settlement include *In re "Agent Orange" Product Liability Litigation*, 100 F.R.D. 718, 723 (E.D.N.Y. 1983), *mandamus denied sub nom. In re Diamond Shamrock Chems. Co.*, 725 F.2d 858 (2d Cir.), *cert. denied*, 465 U.S. 1067 (1984); *see also In re Beef Industry Antitrust Litigation*, 607 F.2d 167, 173-78 (5th Cir. 1979), *cert. denied*, 452 U.S. 905 (1981) (use of tentative settlement classes to facilitate settlement prior to formal certification of class action for trial purposes is permissible).

the aggregate and average case reserves "would be an intolerable intrusion on the bargaining process," allowing "one party to take advantage of the other's assessment of his prospects for victory." Cooper, *Work Product of the Rulesmakers*, 53 Minn. L. Rev. 1269, 1283 (1969).

Even if one insists, as did the Eighth Circuit, on focusing on the diluted insight the aggregate case reserves give to the individual case reserves, the amount or concentration of privileged material has never been used as a criterion for applying the opinion work product doctrine. The opinion work product doctrine does not merely protect documents that reveal an attorney's undiluted mental impressions. Instead, the doctrine protects information that even "tends to reveal the attorney's mental processes." *Upjohn*, 449 U.S. at 399.

When the material sought is so central to an attorney's opinion work product as individual case reserves, which are the foundation for all of the aggregate and average figures, Rule 26(b)(3) and *Upjohn* mandate that this material be accorded special protection. The Eighth Circuit's failure to require the plaintiffs to make any showing of need, let alone the extraordinary need required to discover attorneys' mental impressions, directly conflicts with this Court's teachings in *Hickman v. Taylor* and *Upjohn*, as well as the holdings of all other courts of appeals which have addressed the issue.

B.

THE EIGHTH CIRCUIT'S DECISION TO DENY ATTORNEY-CLIENT PRIVILEGE BECAUSE THE DOCUMENTS ARE NOT SUFFICIENTLY REVEALING CONFLICTS WITH THE HOLDINGS OF OTHER COURTS.

The Eighth Circuit's decision that the attorney-client privilege is inapplicable to documents which indirectly reflect a privileged attorney-client communication conflicts with the holdings of other courts. Contrary to the Eighth Circuit's holding, courts have repeatedly held that the attorney-client privilege is absolute for all documents based on attorney-client communication. *U.S. v. Cuthbertson*, 651 F.2d 189, 198 (3d Cir.) (Seitz, J., concurring), *cert. denied*, 454 U.S. 1056 (1981); *U.S. Dept. of Energy v. Crocker*, 629 F.2d 1341, 1344-45 (Em. Ct. App. 1980); *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 601-02 (8th Cir. 1977). Most courts recognize that the protections of the attorney-client privilege are not limited to communications from clients to attorneys. Rather, a communication from an attorney to a client which tends to reveal a confidential client communication also is protected. *Mead Data Central, Inc. v. U.S. Dept. of Air Force*, 566 F.2d 242, 252, 254 (D.C. Cir. 1977); *Garner v. Wolfinbarger*, 430 F.2d 1093, 1096 n.7 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971); *Natta v. Hogan*, 392 F.2d 686, 692-93 (10th Cir. 1968); *accord In re Ampicillin Antitrust Litigation*, 81 F.R.D. 377, 388 (D.D.C. 1978); *U.S. v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 359 (D. Mass. 1950).

Similarly, in *In re Grand Jury Witness (Salas)*, 695 F.2d 359 (9th Cir. 1982), the Ninth Circuit held that documents such as bills, ledgers, statements and attorney time records were within the scope of the attorney-client privilege because they revealed attorney-client communications. *See also In re Witnesses Before The Special March 1980 Grand*

Jury, 729 F.2d 489, 495 (7th Cir. 1984) (in remanding, court stated that "billing sheets or time tickets which indicate the nature of documents prepared, issues researched or matters discussed could reveal the substance of confidential discussions between attorney and client" and might be privileged). Like the risk management documents, the documents in *Salas* revealed a privileged communication in an indirect manner. Having found that "the risk management documents reflect attorney-client communications running in two directions" (App. 10), the Eighth Circuit should have accorded those communications absolute protection.

C.

THE EIGHTH CIRCUIT'S RULING THAT BOTH THE WORK PRODUCT DOCTRINE AND ATTORNEY-CLIENT PRIVILEGE ARE VITIATED WHEN DOCUMENTS ARE USED FOR BUSINESS PURPOSES DIRECTLY CONFLICTS WITH THE NINTH CIRCUIT'S RULING IN *IN RE GRAND JURY WITNESS (SALAS).*

The Eighth Circuit erred in concluding that work product protection and the attorney-client privilege are vitiated whenever privileged material is used by a client or an attorney for any business purpose, even if the business purpose is simply to avoid destruction of the business by litigation. The Eighth Circuit's logic would render work product protection meaningless in *any* mass tort litigation, where large corporate defendants necessarily make litigation and settlement decisions based on financial and other business considerations.

It is difficult to imagine any document that is generated in anticipation of litigation that might not also have some business function; litigation and business purposes are not mutually exclusive. Under the panel's reasoning, almost

every document prepared by a lawyer or client would be subject to discovery despite Rule 26(b)(3)'s clear mandate that opinion work product must be protected.

In the present case, the business purposes of Searle's case reserve documents were to keep track of, control, and to plan for the costs of Searle's pending product liability litigation. Under the majority's reasoning, if Searle had only a few cases to manage and could employ only one lawyer, the result would have been different. But the tracking of case reserves which was managed by Searle's risk management department became necessary because Searle became an unwilling defendant in a large number of cases.

Only by concluding that, in light of the quantity of lawsuits Searle faces, a court may redefine Searle's business as the "business of litigation" could the majority convert these litigation oriented documents into business planning documents. The majority reached just that conclusion, when it reasoned that "Searle's business involves litigation, just as it involves accounting, marketing, advertising, sales and many other things." (App. 8.) As the dissenting judge recognized, the majority ultimately confronted Searle with an insoluble dilemma: if Searle were not involved in mass tort litigation, the work product doctrine would have no application, but because Searle is involved in litigation, an ordinary course of business exception to the doctrine is deemed to apply. (App. 21.) Thus, litigation, the very event that triggers application of the doctrine, is also deemed to remove the work product from the doctrine's protection, but only for defendants sued by many plaintiffs.

No other court has so eviscerated both the work product doctrine and attorney-client privilege. The Eighth Circuit's ruling is in direct conflict with the Ninth Circuit's

ruling in *In re Grand Jury Witness (Salas)*, 695 F.2d 359 (9th Cir. 1982) (holding that business documents such as bills, ledgers, statements and attorney time records which revealed attorney-client communications in a diluted form were protected by the attorney-client privilege). *See also In re Witness Before The Special March 1980 Grand Jury*, 729 F.2d at 495 (7th Cir. 1984) (on remand, court should consider whether attorney billing sheets and time tickets reveal the substance of attorney-client communications and are therefore protected by attorney-client privilege); *Real v. The Continental Group, Inc.*, No. C-83-2871, slip op. (N.D. Cal. November 10, 1986) (billing statements are protected by work product privilege); *Coleman v. American Broadcasting Companies, Inc.*, 106 F.R.D. 201 (D.D.C. 1985) (business considerations in legal advice do not vitiate attorney-client privilege); *Tronitech, Inc. v. NCR Corp.*, 108 F.R.D. 655 (S.D. Ind. 1985) (audit letter prepared by attorney estimating the financial implications of a lawsuit is protected work product); *In re LTV Securities Litigation*, 89 F.R.D. 595, 601 (N.D. Tex. 1981) ("[i]nformation gathered in such a manner as to be privileged does not become discoverable solely because management makes other business use of the information"); *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 517 (D. Conn.), *appeal dismissed*, 534 F.2d 1031 (2d Cir. 1976) ("privileged advice does not lose its protection when the client adopts it").

By concluding that the aggregate case reserves documents are discoverable, the Eighth Circuit has made it extremely hazardous for any business defending mass tort cases to finance and plan for its defense. In addition, the court's decision threatens to chill litigants from properly documenting and considering all the factors that bear upon the decision to try or settle lawsuits. These are precisely the dangers the work product doctrine is intended to

prevent. *See Hickman v. Taylor*, 329 U.S. at 511 ("[w]ere such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten."). *Cf. Reichenbach v. Smith*, 528 F.2d 1072, 1074 (5th Cir. 1976) ("the cause of justice is advanced by settlement compromises sheparded [sic] by competent counsel, whose experience as advocates makes them reliable predictors of litigation were it pursued to the bitter end.").[6]

In the context of a mass tort case, therefore, aggregate and average assessments of attorneys' mental impressions, thoughts and conclusions take on added significance. Where, as here, a court of appeals has ignored this Court's teachings that attorney-client communications and opinion work product must be protected and has departed from the normal course of judicial proceedings, this Court should grant certiorari to preserve for mass tort defendants the protections afforded all other defendants.

---

[6] When defendants are inhibited from accurately assessing the values of their cases and whether settlements are appropriate, the interests of mass tort plaintiffs are hurt too. As Judge Alvin Rubin observed recently, the costs of litigation today now exceed by more than twice the amount of the net recovery of successful claimants. Rubin, *Mass Torts and Litigation Disasters*, 20 Ga. L. Rev. 429, 434 (1986) (citing Senate Comm. on Commerce, Science and Transportation, Product Liability Act Report, S. Rep. No. 476, 98th Cong., 2d Sess. 7 (1984)). *See also* Comment, *Issues in Asbestos Litigation*, 34 Hastings L.J. 871, 903 n.192 (1983) ("80 to 90 cents of every dollar spent in asbestos litigation is consumed by attorneys' fees and related legal expenses."); J. Kakalik, P. Ebener, W. Felstiner, M. Shanley, *Costs of Asbestos Litigation* (1983) (published by the Rand Corporation's Institute for Civil Justice) (finding that for every fifty-nine dollars paid to claimants in product liability cases, ninety-nine dollars is paid by both claimants and defendants just for legal services). The prospect of further protracted, unsettled litigation holds no advantage for the plaintiffs, as opposed to their counsel.

CONCLUSION

For the above stated reasons, the petition for a writ of certiorari should be granted and the case set down for plenary consideration.

Respectfully submitted,

LAURA A. KASTER *
ROSS B. BRICKER
HOWARD S. SUSKIN
VILIA M. DEDINAS
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

Attorneys for Petitioner

Of Counsel:

GREGORY L. WILMES
FRUTH & ANTHONY, P.A.
1350 International Center
900 Second Avenue South
Minneapolis, Minnesota 55402
(612) 349-6969

* Counsel of Record

Dated: August 26, 1987

APPENDIX

TABLE OF CONTENTS
TO APPENDIX

	PAGE
APPENDIX A – Opinion of the United States Court of Appeals for the Eighth Circuit, April 13, 1987	App. 1
APPENDIX B – Order of the United States Court of Appeals for the Eighth Circuit, July 7, 1987, Denying Petition for Rehearing	App. 24
APPENDIX C – Order of the United States District Court for the District of Minnesota, June 7, 1985	App. 25
APPENDIX D – Report (I) of Special Master, August 22, 1984	App. 27
APPENDIX E – Report (II) of Special Master, September 17, 1984	App. 35
APPENDIX F – Report (III) of Special Master, July 11, 1985	App. 38
APPENDIX G – Order of the United States Court of Appeals for the Eighth Circuit, July 30, 1987, Granting G.D. Searle's Motion for a Stay of Mandate Pending a Filing of a Petition for a Writ of Certiorari	App. 41
APPENDIX H – Rule 28.1 Listing	App. 42

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-5334

Debra A. and George Simon, et al.,	)	
Appellees,	)	Appeal from the United States District Court for the District of Minnesota.
v.	)	
G.D. Searle & Co.,	)	
Appellant.	)	

Submitted: March 13, 1986
Filed: April 13, 1987

Before JOHN R. GIBSON and WOLLMAN, Circuit Judges, and HARRIS,* Senior District Judge.

WOLLMAN, Circuit Judge.

G.D. Searle & Co. appeals the district court's order permitting discovery of certain Searle documents. Pursuant

* The HONORABLE OREN HARRIS, Senior United States District Judge for the Eastern and Western Districts of Arkansas, sitting by designation.

to 28 U.S.C. § 1292(b) (Supp. III 1985), the district court found that its order involved controlling questions of law as to which there was substantial ground for difference of opinion and certified two questions for appeal. The issues in this appeal, reflected in the district court's certified questions, are, first, whether corporate risk management documents prepared by nonlawyer corporate officials, but revealing aggregate information compiled from individual case reserve figures determined by lawyers, are protected from discovery by the work product doctrine or the attorney-client privilege, and, second, whether Rule 26(b)(2) of the Federal Rules of Civil Procedure limits discovery of corporate risk management documents that relates to insurance.

Searle manufactures an intrauterine contraceptive device known as the "Cu-7." Approximately forty products liability actions pending against Searle in the United States District Court for the District of Minnesota and seeking damages for injuries alleged to have resulted from use of the Cu-7 were consolidated for discovery and have generated this appeal. The district court appointed a special master to supervise the discovery process in these cases.

The district court[1] originally ordered Searle to produce "each and every document contained in its files which relates to the Cu-7 IUD." Although Searle produced approximately 500,000 documents to appellees and has continued to provide documents, it resisted the discovery of certain documents from its risk management department. Searle's risk management department monitors the company's products liability litigation and analyzes its litigation reserves, apparently utilizing individual case reserve figures determined by the legal department's assessment of litigation expenses. The risk management department also has re-

[1] The Honorable Miles W. Lord, United States District Judge for the District of Minnesota, retired September 11, 1985. All of the orders relevant to this appeal were issued prior to Judge Lord's retirement. The cases have since been assigned to the Honorable Robert G. Renner, United States District Judge for the District of Minnesota.

sponsibility for the company's insurance coverage. Insofar as Searle's products liability insurance has a high deductible amount, the company is in some respects self-insured.

Pursuant to a district court order, the documents at issue were provided to the special master for *in camera* review. The special master filed with the court his Reports I and II, containing his recommendations concerning the individual documents. He found that the risk management documents were protected by the work product doctrine to the extent that they revealed "specific litigation strategy or mental impressions of attorneys in evaluating cases, or setting a reserve for a specific case," and by the attorney-client privilege if they included communications between an attorney and client concerning legal advice made and kept in confidence. Report I of Special Master, *Simon v. G.D. Searle & Co.*, No. 4-80-160, at 5-7 (D. Minn. Aug. 22, 1984). Documents that revealed aggregate reserve information not identified with individual cases were found discoverable. *Id.* at 5-6. The district court adopted the special master's reports and granted Searle's request for certification pursuant to 28 U.S.C. § 1292(b) in an order issued June 7, 1985. The special master's Report III proposed the questions for appeal, which the district court accepted and certified. The district court also stayed its June 7 order so far as it related to risk management and insurance documents, pending the outcome of this appeal. We granted Searle's petition for permission to appeal.

The questions certified for appeal are as follows:

> 1. To what extent, if any, should Searle's "Risk Management" documents, prepared by nonlawyer corporate officials in an attempt to keep track of, control and anticipate costs of product liability litigation for business planning purposes (including budgetary, profitability and insurance analysis), be protected from discovery by the Work Product Doctrine or the Minnesota attorney-client privilege because some portions of the documents reveal aggregate case reserves and aggregate litigation expenses for all pending

cases when each individual case reserve is determined by Searle's lawyers on a confidential basis in anticipation of litigation?

2. To what extent, if any, does Fed.R.Civ.P. 26(b)(2) limited [sic] the discoverability of Searle's "Risk Management" documents that relate to insurance considerations?

I

STANDARD OF REVIEW

A preliminary question confronting us is the standard of review applicable to an appeal of discovery orders under 28 U.S.C. § 1292(b). That section allows appeals, at the discretion of the court of appeals, when the district judge believes that his action "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal * * * may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b) (Supp. III 1985). Appellees argue that we should not disturb the district court's discretion in discovery matters absent a "gross abuse of discretion resulting in fundamental unfairness." *Voegeli v. Lewis*, 568 F.2d 89, 96 (8th Cir. 1977); *see also Prow v. Medtronic, Inc.*, 770 F.2d 117, 122 (8th Cir. 1985). Searle contends that our role is not so restricted in an appeal under section 1292(b) and cites *Sperry Rand Corp. v. Larson*, 554 F.2d 868, 871 (8th Cir. 1977). In *Sperry Rand* the court stated that the petitioner's choice of a mandamus action, for which the standard of review is whether the district court exceeded the " 'sphere of its discretionary power,' " *id.* at 872 (quoting *Will v. United States*, 389 U.S. 90, 104 (1967)), instead of a section 1292(b) appeal, seriously narrowed the scope of appellate review. We agree with Searle that our review in this section 1292(b) appeal is not confined to determining whether the district court abused its discretion. *See* 9 J. Moore, *Moore's Federal Practice* ¶ 110.22[5] (2d ed. 1986) (review for abuse of discretion not suited to section 1292(b) be-

cause there is no controlling question of law). Section 1292(b) permits the appeal of orders otherwise unappealable and thus provides an avenue for resolving disputed and controlling questions of law, the resolution of which will materially further the litigation. Therefore, we review *de novo* the questions of law certified by the district court. Where, as here, the certified questions embody both factual and legal considerations, we should endeavor to give deference to the district court's factual determinations. We note, however, that the nature and scope of our review are not rigidly determined by the certified questions. *In re Oil Spill by the Amoco Cadiz*, 659 F.2d 789, 793 n.5 (7th Cir. 1981). We remain free to consider " ' "such questions as are basic to and underlie" ' " the questions certified by the district court. *Id.* (quoting *Helene Curtis Indus., Inc. v. Church & Dwight Co.*, 560 F.2d 1325, 1335 (7th Cir. 1977) (quoting 9 J. Moore, *Moore's Federal Practice* ¶ 110.25[1], at 270)); *Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958, 962 n.7 (3d Cir. 1983), *cert. denied*, 465 U.S. 1024 (1984); *United States v. Connolly*, 716 F.2d 882, 885 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1065 (1984).

II

WORK PRODUCT DOCTRINE

Searle's first argument is that its risk management documents are protected from discovery by the work product doctrine. That doctrine was established in *Hickman v. Taylor*, 329 U.S. 495 (1947), and is now expressed in Rule 26(b)(3) of the Federal Rules of Civil Procedure, which provides that "a party may obtain discovery of documents and tangible things * * * prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative * * * only upon a showing that the party seeking discovery has substantial need of the materials." Our application of the work product doctrine to specific documents is guided by the purposes of the doctrine set out in *Hickman*. *See In re Murphy*, 560

F.2d 326, 333-34 (8th Cir. 1977). The work product doctrine was designed to prevent "unwarranted inquiries into the files and mental impressions of an attorney," *Hickman*, 329 U.S. at 510, and recognizes that it is "essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Id.* at 510-11.

The special master found that the risk management documents at issue were generated in an attempt to keep track of, control, and anticipate the costs of Searle's products liability litigation; the documents have been so identified in the district court's first certified question. Report I of Special Master, *supra*, at 2. Many of the documents include products liability litigation reserve information that is based on reserve estimates obtained from Searle's legal department. When Searle receives notice of a claim or suit, a Searle attorney sets a case reserve for the matter. Case reserves embody the attorney's estimate of anticipated legal expenses, settlement value, length of time to resolve the litigation, geographic considerations, and other factors. Affidavit of Eugene W. Bader, *Simon v. G.D. Searle & Co.*, No. 4-80-160, at 2 (D. Minn.) (Bader oversees Searle's risk management program). The individual case reserves set by the legal department are then used by the risk management department for a variety of reserve analysis functions, which the special master found were motivated by business planning purposes including budget, profit, and insurance considerations.

The work product doctrine will not protect these documents from discovery unless they were prepared in anticipation of litigation. Fed. R. Civ. P. 26(b)(3); *see In re Grand Jury Subpoena*, 784 F.2d 857, 862 (8th Cir. 1986), *cert. dismissed sub nom. See v. United States*, 107 S. Ct. 918 (1987). Our determination of whether the documents were prepared in anticipation of litigation is clearly a factual determination:

> [T]he test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have

> been prepared or obtained because of the prospect of litigation. But the converse of this is that even though litigation is already in prospect, there is no work product immunity for documents prepared in the regular course of business rather than for purposes of litigation.

8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2024, at 198-99 (1970) (footnotes omitted); *see Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 604 (8th Cir. 1977), *on rehearing*, 572 F.2d 606 (8th Cir. 1978) (en banc); *The Work Product Doctrine*, 68 Cornell L. Rev. 760, 844-48 (1983). The advisory committee's notes to Rule 26(b)(3) affirm the validity of the Wright and Miller test: "Materials assembled in the ordinary course of business * * * or for other nonlitigation purposes are not under the qualified immunity provided by this subdivision." Fed. R. Civ. P. 26(b)(3) advisory committee notes. Applying this test, we do not believe it can be said that the risk management documents were prepared for purposes of litigation. We are no better qualified to evaluate the facts of this case than the special master and the district court,[2] and we believe their conclusion that the risk management documents are in the nature of business planning documents is a reasonable factual conclusion. The risk management department was not involved in giving legal advice or in mapping litigation strategy in any individual case. The aggregate reserve information in the risk management docu-

---

[2] The special master, with the aid of affidavits, document summaries, and briefs from the parties, reviewed all of the documents at issue *in camera* and in his Reports I and II made recommendations as to each document and in some instances as to sections within the documents. The district court adopted the special master's recommendations after a hearing that included oral argument by the parties and testimony by the special master. Our review has been informed by a record containing all of these materials, with the exception that only six sample documents have been submitted to us *in camera* out of the approximately 400 documents that were provided to the special master.

ments serves numerous business planning functions, but we cannot see how it enhances the defense of any particular lawsuit. Searle vigorously argues that its business is health care, not litigation, but that is not the point. Searle's business involves litigation, just as it involves accounting, marketing, advertising, sales, and many other things. A business corporation may engage in business planning on many fronts, among them litigation.

Although the risk management documents were not themselves prepared in anticipation of litigation, they may be protected from discovery to the extent that they disclose the individual case reserves calculated by Searle's attorneys. The individual case reserve figures reveal the mental impressions, thoughts, and conclusions of an attorney in evaluating a legal claim. By their very nature they are prepared in anticipation of litigation and, consequently, they are protected from discovery as opinion work product. *Hickman*, 329 U.S. at 512; *In re Murphy*, 560 F.2d 326, 336 (8th Cir. 1977). We do not believe, however, that the aggregate reserve information reveals the individual case reserve figures to a degree that brings the aggregates within the protection of the work product doctrine. The individual figures lose their identity when combined to create the aggregate information. Furthermore, the aggregates are not even direct compilations of the individual figures; the aggregate information is the product of a formula that factors in variables such as inflation, further diluting the individual reserve figures. Certainly it would be impossible to trace back and uncover the reserve for any individual case, and it would be a dubious undertaking to attempt to derive meaningful averages from the aggregates, given the possibility of large variations in case estimates for everything from frivolous suits to those with the most serious injuries. The purpose of the work product doctrine—that of preventing discovery of a lawyer's mental impressions—is not violated by allowing discovery of documents that incorporate a lawyer's thoughts in, at

best, such an indirect and diluted manner.[3] Accordingly, we hold that the work product doctrine does not block discovery of Searle's risk management documents or the aggregate case reserve information contained therein.

III

ATTORNEY-CLIENT PRIVILEGE

Searle also argues that its risk management documents are protected by the attorney-client privilege. Rule 501

---

[3] This conclusion is consistent with the holding of *In re Murphy*, 560 F.2d 326, 336 n.20 (8th Cir. 1977), that opinion work product is discoverable only in "rare and extraordinary circumstances." The individual case reserve figures are nondiscoverable opinion work product, but when gathered into the aggregates no identifiable opinion work product remains.

The same observation also applies to *Sporck v. Peil*, 759 F.2d 312 (3d Cir.), *cert. denied*, 106 S. Ct. 232 (1985), and to this court's recent decision in *Shelton v. American Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986). *Sporck* involved discovery attempts relating to a group of documents that were used to prepare for a deposition. The court held that defense counsel's selection of certain documents, out of the thousands involved in the litigation, to prepare a deponent was protected by the work product doctrine, because allowing identification of the documents as a group would reveal counsel's mental impressions. *Shelton* involved a deposition of defendant's in-house counsel, who was questioned as to the existence of certain documents. The court held that the work product doctrine protected knowledge of the existence of the documents, because any recollection of a document's existence would mean that it was important enough to remember, and thus "necessarily would reveal [counsel's] mental selective process." *Shelton*, 805 F.2d at 1329. As we have said, the nature of the aggregate reserve figures at issue here is such that revealing them will not necessarily reveal the specific case reserves and the protected mental impressions embodied therein. In both *Sporck* and *Shelton*, counsel's mental impressions, namely the impressions that certain documents were important or significant, would have been exposed to the world. Clairvoyants aside, no one will learn from the aggregate reserve figures what Searle's attorneys were thinking when they set individual case reserves.

of the Federal Rules of Evidence provides that evidentiary privileges are to be determined in accordance with state law in diversity actions. Consequently, the Minnesota attorney-client privilege, codified at Minn. Stat. Ann. § 595.02(2) (West Supp. 1987),[4] is applicable here.

The risk management documents reflect attorney-client communications running in two directions. First, the aggregate reserve information contained in the documents incorporates the individual case reserve figures communicated by the legal department to the risk management department—an attorney-to-client communication. Second, the record indicates that some of the risk management documents themselves were delivered to Searle attorneys—a client-to-attorney communication.

Assuming *arguendo* that the attorney-client privilege attaches to the individual case reserve figures communicated by the legal department to the risk management department,[5] we do not believe the privilege in turn attaches to the risk management documents simply because they

---

[4] Minn. Stat. Ann. § 595.02(2) (West Supp. 1987) provides:

> An attorney cannot, without the consent of the attorney's client, be examined as to any communication made by the client to the attorney or the attorney's advice given thereon in the course of professional duty; nor can any employee of the attorney be examined as to the communication or advice, without the client's consent.

[5] We state no view whether the attorney-client privilege in fact attaches to the individual case reserve figures, other than to note that such a determination would require analysis of whether the individual reserve figures are based on confidential information provided by Searle. *United States v. Amerada Hess Corp.*, 619 F.2d 980, 986 (3d Cir. 1980); *Mead Data Central, Inc. v. United States Dep't of the Air Force*, 566 F.2d 242, 254 (D.C. Cir. 1977); *see also Hickman v. Taylor*, 329 U.S. 495, 508 (1947); *Schwimmer v. United States*, 232 F.2d 855, 863 (8th Cir.), *cert. denied*, 352 U.S. 833 (1956). We need not decide whether the individual case reserve figures are protected in the light of our determination that even if they are it does not follow that the aggregate information in the risk management documents also is protected.

include aggregate information based on the individual case reserve figures. For the reasons that we have already stated in relation to the work product doctrine, we do not believe that the aggregate information discloses the privileged communications, which we are assuming the individual reserve figures represent, to a degree that makes the aggregate information privileged.[6] The attorney-to-client communications reflected in the risk management documents are therefore not protected by the attorney-client privilege.

Although the aggregate reserve information does not confer attorney-client privilege protection to the risk management documents, those documents that were given to Searle attorneys may still be privileged client-to-attorney communications. The special master devoted only a very brief discussion to this matter. Relying on *Brown v. St. Paul City Ry.*, 62 N.W.2d 688 (Minn. 1954), the special master stated: "A business document is not made privileged by providing a copy to counsel. * * * Thus, those documents from one corporate officer to another with a copy sent to an attorney do not qualify as attorney client communications." Report I of Special Master, *supra*, at 7 (citation omitted). We perceive no error in this statement of the law, which appears to have been carefully applied by the special master to the point of redacting sections of privileged material from within individual documents.

Minnesota adheres to Professor Wigmore's classic statement of the attorney-client privilege, which requires that an attorney-client communication relate to the purpose of

---

[6] When a client acts on privileged information from his attorney, the results are protected from discovery to the extent that they disclose the privileged matter, directly or inferentially. *Cf. Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977). Our holding is faithful to this principle. As we have discussed, the individual case reserve figures cannot be traced or inferred from the aggregate information.

obtaining legal advice before it is protected.[7] *Brown v. St. Paul City Ry.*, 62 N.W.2d 688, 700 (Minn. 1954) (quoting 8 Wigmore, *Evidence* § 2292 (3d ed.)); *see National Texture Corp. v. Hymes*, 282 N.W.2d 890, 895-96 (Minn. 1979). Moreover, a number of courts have determined that the attorney-client privilege does not protect client communications that relate only business or technical data. *See First Wis. Mortgage Trust v. First Wis. Corp.*, 86 F.R.D. 160, 174 (E.D. Wis. 1980); *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 515 (D. Conn.) ("[l]egal departments are not citadels in which public, business or technical information may be placed to defeat discovery and thereby ensure confidentiality"), *appeal dismissed*, 534 F.2d 1031 (2d Cir. 1976). Just as the minutes of business meetings attended by attorneys are not automatically privileged, *see International Tel. & Tel. Corp. v. United Tel. Co.*, 60 F.R.D. 177, 185 (M.D. Fla. 1973); *Air-Shield, Inc. v. Air Reduction Co.*, 46 F.R.D. 96, 97 (N.D. Ill. 1968), business documents sent to corporate officers and employees, as well as the corporation's attorneys, do not become privileged automatically. Searle argues, however, that the special master formulated a *per se* rule barring privilege claims where a document is sent to corporate officials in addition to attorneys. We do not read the special master's report as establishing such an approach. Client communications intended to keep the attorney apprised of business matters may be privileged if they embody "an implied request for legal advice based thereon." *Jack Winter, Inc. v. Koratron Co.*, 54 F.R.D. 44, 46 (N.D. Cal. 1971). Based on this view of the special master's report, we do not

---

[7] 8 Wigmore, *Evidence* § 2292 (McNaughton rev. 1961) (emphasis omitted) states:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

understand the district court to have taken an errant position on the law of the attorney-client privilege. Having stated the applicable law, and noting that there are only six sample documents before us, we decline any invitation to determine the applicability of the privilege to individual documents.

IV

SCOPE OF RULE 26(b)(2)

The district court's second certified question concerns whether Fed. R. Civ. P. 26(b)(2) limits discovery of the corporate risk management documents. Rule 26(b)(2) provides:

> A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Searle argues that Rule 26(b)(2) contains an implicit limitation on the discovery of insurance information beyond the insurance agreement itself. Searle has produced its insurance policies. It now argues that all other insurance information, which it defines to include its reserve information, is nondiscoverable. Appellees respond that Rule 26(b)(2) was not intended to limit discovery but to end the conflict over the relevancy of insurance policies for discovery purposes. Thus we are presented with the question whether the reserve information of a self-insured defendant is discoverable.

The advisory committee's notes to Rule 26(b)(2) reveal that the rule, which was included in the 1970 amendments to the Federal Rules, was not intended to change existing law on discovery concerning self-insured businesses that maintain a reserve fund. Fed. R. Civ. P. 26(b)(2) advisory committee notes; *see Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 352 & n.16 (1978). Therefore, the control-

ling law on this question is that which would have applied to insurance agreements before the 1970 amendments, together with any recent developments concerning insurance documents other than agreements. Prior to the 1970 amendments, "the discovery of matters pertaining to insurance depend[ed] on whether such information was 'relevant to the subject matter' or 'reasonably calculated to lead to admissible evidence.' " 4 J. Moore, *Moore's Federal Practice* ¶ 26.62[1] (2d ed. 1986). This standard, which comes from Fed. R. Civ. P. 26(b)(1), remains applicable to insurance documents other than agreements. We cannot agree with Searle that Rule 26(b)(2) forecloses discovery of any insurance document beyond the agreement. First, the language of the rule itself plainly is not preclusive. Second, the advisory committee expressed concern, at least as to indemnity agreements, that Rule 26(b)(2) not be interpreted to protect insurance information from discovery when that information is relevant under Rule 26(b)(1). *See id.* ¶ 26.62[2]. We hold, therefore, that insurance documents that are not discoverable under Rule 26(b)(2) remain discoverable in accordance with the provisions of Rule 26(b)(1).[8] *Id.*

V

CONCLUSION

Although we have no disagreements with the law as stated by the special master, we recognize that our analysis may have resolved sub-issues not anticipated by the district court. We therefore instruct the district court to re-

[8] The district court reached the same conclusion, and decided that the risk management documents were discoverable under Rule 26(b)(1) because they relate to issues of notice, defect, and punitive damages. We find no reason to disturb this application of the relevant legal standard. Moreover, we also agree with the district court that even if Rule 26(b)(2) were to prevent discovery of insurance documents, we are doubtful that the risk management documents correctly can be termed insurance documents.

view its determinations with respect to the individual documents in the light of the views set forth in this opinion.[9] Moreover, our review of the sample documents leaves us with the definite impression that if they are truly representative of those that will ultimately be held to be discoverable, appellees will acquire nothing in the way of admissible evidence on the issue of liability or on the issue of damages, either compensatory or punitive. The sample documents reveal nothing more than the prudent business decisions that any corporation must necessarily make if it hopes to survive in this litigious age.

With the foregoing qualifications, the order of the district court is affirmed.

JOHN R. GIBSON, Circuit Judge, dissenting.

The court today correctly concludes that individual case reserves set by Searle's attorneys are protected as mental impressions, thoughts, and conclusions under the opinion work product doctrine. It then concludes that averages and aggregates derived from these reserves are not protected. There is a deep inconsistency in protecting the parts but determining that the sum of the parts and calculations based upon the protected figures are not protected.

The court properly reasons that because the Searle attorneys' specific case reserve figures "embody the attorney's [sic] estimate of anticipated legal expenses, settlement value, length of time to resolve the litigation, geographic considerations, and other factors," they reveal the attorneys' mental impressions concerning Searle's pending litigation and are therefore protected opinion work product. *Ante* at 6. The court then denies protection to the risk management documents, which were derived from the

[9] We are concerned about the reference to loss reserves for a specific case mentioned in the sample *in camera* documents submitted to us. Those references presumably should be redacted.

nondiscoverable mental impressions of Searle's attorneys and, as the special master found, "arguably [give the] plaintiffs some insight into Searle's attorneys' thought processes of setting reserves." Report I of Special Master, *Simon v. G.D. Searle & Co.*, No. 4-80-160, at 5-6 (D. Minn. Aug. 22, 1984). In allowing discovery of the risk management documents, the court fails to consider the full import of the mental impression/opinion work product doctrine, which gives virtually absolute protection to both the mental impressions of Searle's attorneys—as contained in the specific case reserve figures and necessarily reflected in the risk management documents—and the mental impressions of Searle's representatives, as contained in the risk management reports.

Since the Supreme Court's decision in *Hickman v. Taylor*, 329 U.S. 495 (1947), the courts have recognized that particular solicitude is given mental impression/opinion work product as contrasted to the ordinary work product protection accorded other documents and materials prepared in anticipation of litigation. In *Upjohn Co. v. United States*, 449 U.S. 383 (1981), the Supreme Court recognized mental impression/opinion work product as "deserving special protection" under Rule 26. *Id.* at 400. The Court considered, but found unnecessary to decide, whether any showing of necessity could ever overcome the protection afforded such work product. It recognized, however, that simply showing "substantial need and inability to obtain the equivalent without undue hardship" is not sufficient. *Id.* at 401. In *Shelton v. American Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986), we observed that the work product doctrine protects not only materials obtained or prepared in anticipation of litigation, "but also the attorney's mental impressions, including thought processes, opinions, conclusions, and legal theories." *Id.* at 1328; *see also Sporck v. Peil*, 759 F.2d 312, 316 (3d Cir.) ("Rule 26(b)(3) recognizes the distinction between 'ordinary' and 'opinion' work product first articulated by the Supreme Court in *Hickman v. Taylor*"), *cert. denied*, 106 S. Ct. 232 (1985); *In re Murphy*, 560 F.2d 326, 336 (8th Cir. 1977) ("opinion

work product enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances"). The court today fails to give full weight to the special protection accorded mental impression/opinion work product.

In the present case, we are asked to protect mental processes that go to the essence of the lawyer's expertise—establishing the value of a legal claim and the fees and expenses that may be incurred in its defense. The litigation's ultimate cost to the client has great significance in determining whether a lawsuit will be tried or settled and, if settled, for what amount. Establishing the value of a claim is analytically complex, requiring an assessment of the body of evidence and the particular legal issues involved in each case, as well as an evaluation of the case's strengths and weaknesses. It is one of the more challenging and difficult tasks a lawyer confronts. In *Work Product of the Rulesmakers*, 53 Minn. L. Rev. 1269 (1969), Professor Edward H. Cooper discusses the importance of an attorney's private evaluation of a claim in facilitating the bargaining process inherent in our system of justice:

> Some of the areas in which the work product doctrine forecloses discovery are easily comprehended * * * as well. One obvious example is the need for protection against forced revelation of a party's evaluation of his case; as long as voluntary settlement is encouraged, it would be an intolerable intrusion on the bargaining process to allow one party to take advantage of the other's assessment of his prospects for victory and an acceptable settlement figure.

Id. at 1283.

The special master's report states that the aggregate reserve figures may give some insight into the mental processes of the lawyers in setting specific case reserves. This is inevitable, considering that these aggregates and averages are based upon the attorneys' evaluations of the value of specific claims. Notably, this is not a situation

where mental impressions are merely contained within and comprise a part of another document and can easily be redacted. Instead, the aggregate and average figures are derived from and necessarily embody the protected material. They could not be formulated without the attorneys' initial evaluations of specific legal claims. Thus, it is impossible to protect the mental impressions underlying the specific case reserves without also protecting the aggregate figures.

Apparently, the court reasons that if an attorney's mental impressions are revealed only indirectly and in a diluted manner, they are not protected as opinion work product. *See ante* at 8-9 & n.3. This, however, has never been used as a criteria for applying the opinion work product doctrine. In *Shelton v. American Motors Corp.*, *supra*, we held that an attorney could not be compelled to acknowledge whether specific corporate documents existed because such acknowledgements would reveal her mental processes, which are protected under the opinion work product doctrine. *Id.* at 1329. The selection of documents involves a substantially less complex mental process than does arriving at a case reserve figure. In selecting documents, an attorney assesses a document's relevance and materiality to the legal issues in the case, and considers its admissibility. This analysis stops short of the weighing and evaluating necessary to determine case reserves. Yet, in *Shelton* we protected this information, for the opinion work product doctrine does not merely protect materials that, as the majority suggests, directly reveal an attorney's undiluted mental impressions. Instead, the doctrine is premised on values fundamental to the American scheme of justice and protects information that even "tends to reveal the attorney's mental processes." *Upjohn Co.*, 449 U.S. at 399. The risk management documents certainly fall within this protected ambit. The relationship between the attorneys' mental impressions and these documents is no less tenuous than the relationship between the attorney's mental impressions and the information we held nondiscoverable in *Shelton*. *See also*

Sporck, 759 F.2d at 315-17 (selection of documents is in the "highly protected category of opinion work product").

The court is equally in error in focusing solely on the mental impressions of Searle's lawyers. While the court protects the mental impression/opinion work product concerning the attorneys' evaluation of the reserve necessary for each lawsuit, it fails to grant similar protection to the risk management department's opinion work product concerning the aggregate reserve necessary for the Cu-7 litigation. I find no basis in Rule 26(b)(3) for this distinction. Rule 26(b)(3) requires a court to "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney *or other representative* of a party concerning the litigation." Fed. R. Civ. P. 26(b)(3) (emphasis added). Thus, protected work product is not confined to information or materials gathered or assembled by a lawyer. *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 603, *rev'd in part on other grounds*, 572 F.2d 606 (8th Cir. 1977). Instead, it includes materials gathered by any consultant, surety, indemnitor, insurer, agent or even the party itself. Fed. R. Civ. P. 26(b)(3). The only question is whether the mental impressions were documented, by either a lawyer or nonlawyer, in anticipation of litigation. Here, in the face of pending litigation, the risk management group monitored, controlled, and anticipated the costs of the litigation. The group compiled the individual reserve figures established by Searle's attorneys and analyzed them in light of a number of variables to arrive at aggregate reserve figures. This is no less a mental impression concerning Searle's litigation than were the attorneys' thoughts in arriving at individual reserve figures.

The court concludes that the risk management documents cannot qualify for work product protection because they were not prepared in anticipation of litigation. It reasons that "Searle's business involves litigation," and, therefore, the risk management documents are for business planning purposes. *Ante* at 8. The court thus concludes that the risk management documents fall into the "ordinary course of business" exception to the work prod-

uct doctrine. *See* Fed. R. Civ. P. 26(b)(3) advisory committee note. This analysis, however, causes the exception to swallow the rule and makes the anticipation-of-litigation test meaningless as it concerns materials prepared by a defendant's employees.

First, we cannot authorize discovery of documents containing representatives' mental impressions concerning pending litigation simply because the documents also serve a business purpose. It is difficult to imagine a document that is generated by a party's nonlawyer representatives in anticipation of litigation that does not also have some business purpose; the purposes are not mutually exclusive. Under the court's analysis, almost every document prepared by a nonlawyer is subject to discovery despite Rule 26(b)(3)'s concern with protecting opinion work product of both the lawyer and nonlawyer. *See id.* ("Subdivision (b)(3) reflects the trend of the cases by requiring a special showing, not merely as to materials prepared by an attorney, but also as to materials prepared in anticipation of litigation or preparation for trial by or for a party or any representative acting on his behalf.") If all such records were discoverable, a business would be seriously impaired in calculating and recording the financial aspects of litigation or in taking other necessary corporate action regarding the litigation. Of course, just as not every document an attorney prepares concerning pending litigation is protected opinion work product, neither is every business document prepared by a nonlawyer. The determination, however, should not hinge on whether the material has an ancillary business purpose.

Second, in the present case, the business purposes of the documents were to keep track of, control, and plan for the costs of Searle's pending products liability litigation. Only by concluding that Searle is in the business of litigation can the court convert these litigation-oriented documents into business planning documents. The court reaches just this conclusion, however, when it reasons that "Searle's business involves litigation, just as it involves accounting, marketing, advertising, sales, and many other

things." *Ante* at 8. In eroding the protection Rule 26(b)(3) affords, the court confronts Searle with a dilemma of Catch-22 proportions: if Searle were not involved in litigation, Rule 26(b)(3) would have no application, but because Searle is involved in litigation, the ordinary course of business business exception applies. Thus, litigation, the event that triggers application of the rule, also triggers application of the exception.

Moreover, when considered within the increasingly common context of mass products liability litigation, the aggregate and average figures may take on even greater significance. Today's products liability litigation often involves hundreds of lawsuits against one or more corporate defendants based upon a single or related products. The plaintiffs in these cases usually join forces and are represented by organized counsel. The defense, if not unified, is usually coordinated. Settlements can be negotiated so as to dispose of the claims of all or several plaintiffs at once. *See, e.g.*, 3A L. Frumer & M. Friedman, *Products Liability* § 46A.07[1] (1986); Rubin, *Mass Torts and Litigation Disasters*, 20 Ga. L. Rev. 429, 431 (1986) (Agent Orange class estimated to include between 600,000 and 2.4 million plaintiffs; 4,500 plaintiffs' lawyers settled claims for $180,000,000); Vairo, *Multi-Tort Cases: Cause for More Darkness on the Subject, or a New Role for Federal Common Law*, 54 Fordham L. Rev. 167, 170 n.6 (1985) (settlement fund established to dispose of 680 asbestos claims). Just as a specific reserve figure gives an opponent an unfair advantage in settlement negotiations, an aggregate reserve figure would give attorneys representing a group of opponents an equally unfair advantage. In this instance, the cases of forty plaintiffs with claims based on the Cu-7 have been consolidated for discovery in the Minnesota district court. Material that may be of questionable value in one case becomes more meaningful when considered in the context of a number of cases. We would be naive not to recognize the sophisticated analysis that is possible in this day of the computer. Comparison between different groups of cases and periods of time conceivably

could give one party substantial insight into the thought processes of the other. Therefore, when the aggregate and average figures are produced for attorneys representing a large group of opposing litigants and are examined with reference to the entire group, the opposition obtains information containing the Searle attorneys' mental processes that is much less diluted and indirect than the court acknowledges. When we deal with so sensitive a mental process as the calculation of individual case reserves, the foundation for all of the aggregates and averages, Rule 26(b)(3), *Upjohn*, *Shelton*, and *Murphy* mandate that we accord this material special protection. We fail to do so when we make the aggregate and average figures available to the opponent.

Significantly, Searle is defending not one but rather hundreds of Cu-7 lawsuits. *See* Thornton, *Intrauterine Devices*, Trial, Nov. 1986, at 44, 46 (Searle defending more than 600 Cu-7 lawsuits). Searle is undoubtedly concerned with each lawsuit, and the court properly recognizes that the Searle attorneys' mental impressions concerning each lawsuit are protected. Searle's greater concern, however, is its liability exposure and the costs related to defending this aggregate of lawsuits. When subjected to mass tort litigation, a defendant should be allowed to confidentially analyze the litigation as a whole, plan for its defense, and compare the costs of settlement with the costs of proceeding through trial. The aggregate and average reserves play an essential and unique role in these activities. By requiring Searle to share its assessments with its adversaries, the court unfairly hinders Searle's ability to organize its defense.

A party, in managing its litigation, should not be forced to provide materials to its opponent that necessarily reflect its lawyers' mental impressions regarding the litigation and contain its agents' mental impressions concerning the cost of the litigation. By concluding that the risk management documents are discoverable because they only indirectly reflect the attorneys' impressions and because they were created for business planning purposes, the

court makes it extremely hazardous for a business to finance and plan for its defense. The incidental effect of this decision could be the failure of litigants to properly document and consider all the factors that bear upon the decision to try or settle lawsuits. *Cf. Hickman v. Taylor*, 329 U.S. at 511 ("Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten.").

This is not a case where there has been limited discovery. Searle has produced over 500,000 documents. Those documents based on the mental impressions of its lawyers and representatives concerning litigation strategy and costs, which the court today admits may be of limited value, should not be the subject of discovery.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-5334

Debra A. and George Simon, et al., Appellees, v. G.D. Searle & Co., Appellant.	)	Appeal from the United States District Court for the District of Minnesota.

Appellant's petition for rehearing en banc is denied for lack of a majority of judges voting in favor of it.

Judge Ross, (John) Gibson, Fagg, Bowman and Magill would have granted the petition.

Petition for rehearing by the panel is also denied.

July 7, 1987

Order entered at the Direction of the Court:

/s/ ROBERT D. ST. VRAIN

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX C

[June 7, 1985]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Debra A. Simon and George Simon, et al.,	)	File Nos. Civ. 4-80-160, et al
Plaintiffs,	)	
vs.	)	ORDER
G.D. Searle & Co.,	)	
Defendant.	)	

A hearing was held before the undersigned on September 24, 1984, on the objections to the Report (I) of Special Master Peter Thompson, dated August 22, 1984. Leo Feeney, Esq., Thomas Christenson, Esq., and Douglas Muirhead, Esq., appeared as lead counsel for the plaintiffs. Clifford M. Greene, Esq., and Gregory L. Wilmes, Esq., appeared for Defendant G. D. Searle & Co.

In addition, Special Master Thompson filed Report (II) dated September 18, 1984, and Searle has filed objections thereto. The parties agree that no additional oral argument is necessary since Report (II) involves the same issues as addressed by Report (I).

Based upon all the records, files and proceedings herein, and upon the briefs and arguments of counsel,

IT IS HEREBY ORDERED THAT

1. Special Master Thompson's reports of August 22, 1984, and September 18, 1984, are adopted, and Searle's objections are overruled;

2. Plaintiffs shall return to Defendant all privileged documents inadvertently produced, except for the ten documents produced to other Plaintiffs' attorneys. Implementation of this paragraph of the order is stayed so that either party may move within a reasonable time to reopen the Report of Special Master Goldberg;

3. Searle's request for certification pursuant to 28 U.S.C. 1292(b) is granted (Miles W. Lord); and

4. This Order, to the extent it relates to risk management and insurance documents, is stayed until the 8th Circuit Court of Appeals rules upon a petition for mandamus concerning the same, to be filed by Searle within five days from the date of this Order.

Dated: This 7th day of June, 1985.

/s/ MILES W. LORD
The Honorable Miles W. Lord
Chief Judge

APPENDIX D

[August 22, 1984]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Debra A. and George Simon, et al.,	)	
Plaintiffs,	)	Civ. No. 4-80-160
	)	Report (I)
vs.	)	of Special Master
G. D. Searle & Co.,	)	
Defendant.	)	

These consolidated cases are referred to me as Special Master, for recommendations as to the discoverability of certain documents. Plaintiffs are provided with a description of each document setting forth the author, recipients, and general description of the subject matter of the document. Defendant has also submitted affidavits in support of the claim of privilege. After a review of the document and briefs submitted by counsel, I submitted a draft of my recommendations to counsel for comment pursuant to Fed. R. Civ. P. 53(e)(5). Counsel filed supplementary briefs and a hearing was held providing counsel the opportunity to comment on the preliminary draft. Based on all of the files and proceedings I make my report to the Court as provided by Fed. R. Civ. P. 53.

In these actions plaintiffs seek damages for injuries sustained while using the CU-7 intrauterine contraceptive device manufactured by defendant G. D. Searle & Company.

Discovery has been proceeding since 1982. In February of 1983 there was some on-site inspection of documents at defendant's headquarters in Skokie, Illinois. In July of 1983 Judge Lord ordered that a Document Depository be established in Minneapolis, Minnesota. Thousands of documents have been produced.

The documents submitted to me for *in camera* review include a group of documents referred to as Risk Management Documents and a group referred to as Patent and Trademark documents. The Risk Management documents were generated by Searle generally in an attempt to keep track, control, and anticipate the costs of its product liability litigation. Although Searle maintains product liability insurance, it has a high deductible, and to some extent, functions as a self-insurer. A specific case reserve is set by a Searle attorney for each claim based on the attorney's assessment of the litigation expense. The specific case reserve is not made public, although an aggregate product liability reserve for all claims on all products is reported on the financial statement.

The Risk Management Department, part of the Treasurers' Department at Searle, monitors the litigation and prepares periodic reserve analysis that are distributed to other departments and are used for business planning purposes. The Risk Management Department is also responsible for purchasing or renewing insurance and works with the attorneys to prepare submissions to the insurance companies. None of the documents reviewed involve Risk Management giving legal advice or playing a role in specific litigation strategy of any of the cases. The risk management documents include documents largely generated by the Risk Management Department or other departments in the corporation concerning budgetary, profitability, and insurance considerations relating to the Cu.7.

Defendant asserts three grounds for the nondiscoverability of these documents. Initially Defendant maintains that the documents are outside the scope of discovery. Defendant characterizes the documents as insurance documents and relies on the general rule that evidence of insurance

is not admissible on the issue of whether the Defendant acted wrongfully or negligently. See Fed. R. Evid. 411. Further Defendant maintains that Fed. R. Civ. P. 26(b)(2), which permits discovery of the contents of insurance agreements limits the discoverability of other information relating to insurance documents.

Rather than insurance documents, most of the documents are better characterized as ordinary business documents of the corporation assessing budgetary, financial as well as insurance needs of the corporation. Secondly, even if the documents are characterized as insurance documents, Fed. R. Evid. 411 and Fed. R. Civ. P. 26(b)(2) do not provide a total privilege for any document relating to insurance. Fed. R. Civ. P. 26(b)(2) permits the discovery of insurance agreements which might not fit the general scope of discovery as provided in Rule 26(b)(1). It does not shield documents that otherwise are discoverable under Rule 26(b)(1). Fed. R. Evid. 411 precludes evidence that a person was or was not insured only on the issue of negligence or wrongful conduct. It does not preclude business planning documents that reflect business assessment of future claims and/or profitability merely because these documents are used for the purpose of assessing insurance needs. Plaintiff is seeking to prove that the product was defective and that the defendant acted wilfully, intentionally, and fraudulently with respect to marketing the defective product. What the corporation knew, the judgments it made with respect to marketing and manufacturing the product are in issue in these cases. These documents are relevant to and are calculated to lead to discoverable evidence on these issues. That is not to say that because Defendant engaged in planning about future liability that Defendant acted wrongfully. Obviously good business practices require future planning, and the documents might well establish that Defendant acted entirely properly in its business judgments. The issue at this point is whether they are discoverable, not whether they actually prove one issue or another. The documents relate to the issue of notice, defect, and questions relating to punitive damages and are within the scope of discovery.

Next, Defendant maintains that these documents are protected by the work product privilege. To qualify for work product privilege the documents must be prepared in anticipation of litigation. *Hickman v. Taylor*, 329 U.S. 495 (1947), Fed. R. Civ. P. 26(b)(3). Although the actual determination of what reserve to place on a particular case is made with reference to specific litigation, most of the documents produced were not prepared in anticipation of litigation but were prepared by corporate officials for business purposes such as budgeting questions, profitability analysis, and insurance needs. Obviously the outstanding litigation, past litigation history, and future litigation prospects are important to these business considerations. The work product doctrine, however, does not protect these business documents reflecting discussions among corporate officers in Risk Management, the Comptroller or Treasurer Departments even if the discussions are based in part on information generated by litigation. According to 8 C. Wright and A. Miller, Federal Practice and Procedure #2024:

> Thus the test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. But the converse of this is that even though litigation is already in prospect, there is no work product immunity for documents prepared in the regular course of business rather than for purposes of litigation.

On the other hand, many of the documents reveal specific litigation stragegy on identified cases. To the extent that a document reveals specific litigation strategy or mental impressions of attorneys in evaluating cases, or setting a reserve for a specific case, the principles of the work product doctrine are applicable to bar discovery. It would be unfair for a plaintiff to know how her particular case was assessed by Searle's lawyers. This work product privilege is not waived by sharing this information, where necessary, with corporate officers or outside auditors or insurance agents.

Documents that simply reveal aggregate reserves or aggretate projected reserves for future cases yet to be filed, not identified by case, or discussions among corporate officials centering on past experience to base future projections, or analyzing budget, profit or insurance needs do not merit work product protection. It is true that Plaintiffs could take an aggregate reserve and determine an average reserve per case, which arguably gives plaintiffs some insight into Searle's attorneys' thought processes of setting reserves. At this point, however, the connection between the document and the specific litigation strategy is too indirect. Plaintiff should not be deprived of these business documents merely because the documents rely in part on information generated in the litigation process. Furthermore, Defendants have already produced pursuant to court order, actual settlement figures.

Assuming, in the alternative, that the aggregate reserves revealed in these documents is work product, I would view it as ordinary work product subject to the substantial need and undue hardship requirement. I conclude that plaintiff has met that standard. The materials reflect on key issues pertinent to this litigation. To prove these issues the parties must have these business documents revealing the corporate action, analysis, and planning. The business planning obviously is influenced by the substantial litigation generated by the Cu. 7. Thus, it is impossible to analyze the Defendant's business assessments without reference to the past and future litigation prospects. The documents reflect corporate action, corporate judgments, corporate knowledge that could be obtained only by corporation documents.

Finally, Defendant maintains that some of the documents are protected by the attorney-client privileges. To qualify for the attorney client privilege there must be a communication between an attorney and client, concerning legal advice, and made and kept in confidence. See Minn. Stat. § 595.02(2); *Brown v. St. Paul City Railway Company*, 62 N.W.2d 688 (Minn. 1954). A business document is not made privileged by providing a copy to counsel. See *Brown v. St. Paul City Railway Co.* Thus, those

documents from one corporate officer to another with a copy sent to an attorney do not qualify as attorney client communications.

Based on my review of the briefs and records, I recommend as follows:

1. The following Risk Management documents reveal specific case reserves or specific litigation strategy and are protected by the work product privilege: 80, 89-110, 113, 114[1], 123[2], 125-128, 130-134, 136, 138, 147-152, 235, 246-248.

2. The following Risk Management documents are attorney client communications or include an attorney-client communication and are protected by the attorney client privilege: 24[3], 48, 49[4], 51[5], 53[6], 60[7], 61[8], 69, 70, 112, 121, 135, 137[9], 233, 234, 236-244, 249.

3. The following Risk Management documents are business documents relating to budget, insurance or other business concerns, do not reveal specific case reserves and are discoverable: 1-23, 24[3], 25-47, 49[4], 50, 51[5], 52, 53[6], 54-59, 60[7], 61[8], 62-68, 71-79, 81[10], 82-88, 111, 115-120, 122, 123[2], 124, 129, 138[9], 139, 140, 141[11], 142[11], 143, 144, 145[11], 146, 235, 245[13].

4. With respect to the patent trademark documents No. 161-231, I find that all the documents are privileged by the attorney client privilege with the exception of the following:

a. Documents 175 and 196, which are communications to and from nonlawyers and thus are discoverable.

b. Documents 176, 177, 178, and 192 which are communications between the licensor and Searle's attorneys. They are not privileged because there was no attorney client relationship between the licensor and Searle's attorneys.

c. The draft of the license agreement attached to the memo in Document 205 is not an attorney client communication and is not privileged.

5. I received and reviewed no documents numbered 153-160, 232.

6. On many of the discoverable documents there is information that relates to products other than the product in dispute. If Defendant wishes to remove those portions of discoverable documents that clearly and solely relate to products other than the products in dispute, counsel should submit to me all proposed redactions by September 7, 1984.

7. Finally, Defendant seeks the return of approximately 29 documents that were determined to be privileged by Special Master Goldberg, but have been inadvertently produced to Plaintiffs. Plaintiffs maintain that the disclosure waives the privilege and they should be permitted to use the documents. Defendant has submitted affidavits from the attorneys who supervised the on-site production in Illinois and the production for the Minnesota depository. It is not known whether these documents were produced at the on-site inspection or through the Minnesota depository. The document search involved the production of several hundred thousand documents. In the affidavits counsel establish the precautions used in the effort to screen out privileged documents from the production. Based on the affidavits and presentation of counsel, I am satisfied that the Defendant took adequate precautions to protect the confidentiality of its documents and that the disclosure was not intended as a waiver of privilege. I conclude that there has been no waiver of the privilege and the documents should be returned to defendant. See *Control Data Corp. v. IBM*, 16 Fed. R. Serv. 2d 1233 (D. Minn. 1972); Note, Inadvertent Disclosure of Documents Subject to the Attorney Client Privilege, 82 Mich. L. Rev. 598 (1983).

8/22/84

/s/ PETER N. THOMPSON
Peter N. Thompson
Special Master
1536 Hewitt Avenue
St. Paul, MN 55104
(612) 641-2138

Footnotes

1. For D-114 memo from Roskopf to Gyenes is not privileged.

2. For D-123 only the first two pages are protected by work product. The remainder is discoverable.

3. For D-24 only the 8/8/83 memo from Liddy to Bader, Thies and Seeley is privileged. The remaining attachments are discoverable.

4. For D-49 only the following is privileged:

    1. The last four sentences of paragraph 1; the last sentence, paragraph one, page 2; and the last two sentences paragraph three, page two of Larson's 8/13/81 memo.

    2. The first two sentences of Larson's 8/3/81 memo.

    The remainder is discoverable.

5. For D-51 only the 7/17/81 memo from Roskopf to Bose is privileged. The remaining attachments are discoverable.

6. For D-53 only the following is privileged: the report of Thies found in page two, paragraph 4; page two, first seven sentences of paragraph 5; page 3, first paragraph.

7. For D-60 only the 8/25/80 memo from Roskopf to Thies is privileged. The attachments were produced to be used in part for liability limits and annual reserve review and are discoverable.

8. For D-61 only the 4/29/80 memo from Roskopf to Thies is privileged. The remainder is discoverable.

9. D-137 includes the privileged 8/25/80 memo from Roskopf to Thies referred to in n.7. The remainder is discoverable.

10. For D-81 redact methodology for figuring reserves, opinion attributed to R. Theis and claims handling procedures which are privileged.

11. For D-141, 142 redact sections on Product Liability Claim Procedures and Personnel which are work product.

12. For D-145 redact statements attributed to R. Theis which are privileged.

13. For D-245 redact second paragraph which is privileged.

APPENDIX E

[September 17, 1984]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Debra A. and George Simon, et al.,	)	
Plaintiffs,	)	Civ. No. 4-80-160 Report (II)
vs.	)	of Special Master
G. D. Searle & Co.,	)	
Defendant.	)	

Pursuant to Orders of the Court Defendant has supplemented its production of documents and has produced several hundred documents for my *in camera* inspection. Defendant maintains that the documents are not discoverable because they are not within the scope of discovery, are privileged by the attorney client privilege or are work product. I have generally addressed these issues in Report (I) of the Special Master dated August 22, 1984. I incorporate the rationale provided in that report as explanation for my recommendations with one addition.

Several of the documents submitted in this supplemental production concern matters that are sufficiently unrelated to the litigation that they are not calculated to lead to relevant evidence. Although they may relate to the

Cu 7 they do not reflect business assessments of future claims and/or profitability or issues relating to notice, defect, or punitive damages.

Based on my review of the documents, briefs, and records, I recommend as follows:

1. The following documents are protected by the work-product doctrine: 21-33, 35-38, 256, 284, 366.

2. The following documents are attorney-client communications or include attorney client communication and are protected by the attorney client privilege: 1-6, 9-18, 19[2], 20[3], 39, 42[4], 46-48, 153, 155, 160[5], 161, 163, 164, 175, 177, 227, 228, 250, 288, 289, 295, 296, 301, 326, 328, 338, 350.

3. The following documents are outside the scope of discovery: 43, 44, 156, 158, 159, 180, 192, 251, 252, 259, 264, 265, 267, 272-275, 277, 279-282, 286, 287, 294, 299, 300, 303, 304, 308, 313, 316-320, 324, 332.

4. The following documents are business documents relating to budget, insurance or other business concerns, do not reveal specific case reserves and are discoverable: 7[1], 8[1a], 34, 40, 41, 45, 154, 157, 162, 165-174, 176, 178, 179, 181-187, 188[6], 189-191, 193-203, 204[7], 205-215, 216[8], 217, 218[9], 219-226, 229-246, 247, 248, 249, 253-255, 257, 258, 260-263, 266, 268[10], 269-271, 276, 278, 283, 285, 290, 291, 292[11], 293, 297, 298, 302, 305-307, 309-312, 314, 315, 321-323, 325, 327, 329-331, 333-335, 336[12], 337, 339-349, 351-365, 367-381.

5. Exhibit A attached to the affidavit of Dr. Irvin Strathman, is prepared in anticipation of litigation and is work-product.

6. Defendant may redact those portions of discoverable documents that relate clearly and solely to products other than the products in dispute. Counsel should submit to me all proposed redactions by September 28, 1984.

7. In this supplemental production I reviewed no documents bearing numbers 49-152.

Dated September 17, 1984

/s/ PETER N. THOMPSON
Peter N. Thompson
Special Master
1536 Hewitt Avenue
St. Paul, MN 55104
(612) 641-2138

Footnotes

1. Redact second paragraph.

1a. Although this document was sent to an attorney, arguably for a legal response, it was also sent to two non-lawyers for a response as well. The communication to non-lawyers is not privileged merely because the same communication is sent to a lawyer.

2. Attachments G02051-56 are not privileged.

3. Attachments G02058-59 are not privileged.

4. Attached memo (G02246-50) is not privileged.

5. Only the discussion with Rogers 632078 is privileged.

6. Redact advice from Thies.

7. Redact legal department perception of Cu 7 litigation.

8. Redact legal department opinion.

9. Redact legal department opinion.

10. Redact advice of Thies.

11. Redact reference to specific claims.

12. Redact legal department procedures.

APPENDIX F

[July 11, 1985]

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Debra A. and George Simon, et al.,	)	
Plaintiffs,	)	Civ. No. 4-80-160
	)	Report (III)
vs.	)	of Special Master
G. D. Searle & Co.,	)	
Defendant.	)	

On June 7, 1985, the Court overruled defendant G. D. Searle & Co. (Searle) objections to the Special Master's Reports (I and II) with respect to the production of the so-called "Risk Management" and "Insurance" documents. The Court, however, agreed to certify controlling questions of law pursuant to 28 U.S.C. § 1292(b). Each party has submitted to me a proposed order defining the issues to be certified. I have also met with the parties on this matter. Based on the parties' submissions, argument, and the files in this matter, I recommend that the Court certify the following two questions:

1. To what extent, if any, should Searle's "Risk Management" documents, prepared by nonlawyer corporate officials in an attempt to keep track of, control and anticipate costs of product liability litigation for business purposes (including budgetary, profitability and insurance analysis),

be protected from discovery by the Work Product Doctrine or the Minnesota attorney-client privilege because some portions of the documents reveal aggregate case reserves and aggregate litigation expenses for all pending cases when each individual case reserve is determined by Searle's lawyers on a confidential basis in anticipation of litigation?

2. To what extent, if any, does Fed. R. Civ. P. 26(b)(2) limit the discoverability of Searle's "Risk Management" documents that relate to insurance considerations?

I have attached a proposed order (App. A.) for the Court's consideration.

Searle argues that the first question should include reference to the fact that it maintains a high deductible in its insurance coverage and thus to some extent is self-insured. Whether Searle has a high deductible or low deductible, or no deductible does not alter the basic legal issue. Since the recommended question specifically refers to Searle's documents, the question is broad enough for Searle to argue on appeal that its status as a partial self insurer should be controlling or otherwise justify reversing the Court's determination on these documents.

Searle also argues that the question should indicate that the documents reveal the methodology for setting case reserves. "Methodology" is a broad term. Since the documents reveal aggregate case reserves and average case reserves, they reveal to some extent the methodology for setting case reserves. An effort was made, however, by the Court to protect against revealing "specific litigation strategy or mental impressions of attorneys in evaluating cases, or setting a reserve for a specific case." Special Master's Report I, at 5. To this extent the documents or portions[1] ordered to be produced do not reveal methodology for setting case reserves. The extent to which the

[1] The redaction process as contemplated in the Masters' Reports has not begun.

documents *improperly* reveal Searle's methodology can be argued on appeal.

Searle also has submitted additional issues to be certified. I have attached Searle's proposed questions to this Report as Appendix B. The remaining issues proposed by Searle do not raise controlling issues of law that can be certified under the statute.

Plaintiffs object to Question 2 maintaining that there is no "substantial grounds for difference of opinion" on this issue. The parties, however, have not provided any directly controlling authority on this issue.

Counsel for the parties have been meeting on a regular basis to work out procedures and coordinate the discovery process. Most of the issues are being worked out by agreement. I anticipate that the parties will soon have a stipulation setting forth the ground rules, timetable and procedures for completing the discovery and preparing these cases for trial. I have scheduled a hearing for July 31, 1985, to consider unresolved matters.

/s/ PETER N. THOMPSON 7/11/85
Peter N. Thompson
Special Master
1536 Hewitt Avenue
St. Paul, Minnesota 55104
(612) 641-2138

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-5334—MN

Debra A. and George Simon, et al.,	)	
Appellees,	)	Appeal from the United States District Court for the District of Minnesota.
v.	)	
G.D. Searle & Co.,	)	
Appellant.	)	

The motion of appellant to stay the issuance of the mandate pending certiorari proceedings is granted. Issuance of the mandate is stayed until August 31, 1987. If within that time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari has been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

July 30, 1987

Order Entered at the Direction
of the Court:

/s/ ROBERT D. ST. VRAIN

Clerk, U. S. Court of Appeals,
Eighth Circuit.

APPENDIX H

Rule 28.1 Listing

G. D. Searle & Co. is a wholly-owned subsidiary of Monsanto Company.

The following are domestic subsidiaries or affiliates of Monsanto Company and G. D. Searle & Co.:

Monsanto

ACM Services, Inc.
InnoVen II Corporation
Invitron Corporation
Kinetek Systems Incorporated
Monsanto Venture Capital, Inc.
Monsanto Venture Capital II, Inc.

G. D. Searle

Lorex Pharmaceuticals

The following are foreign subsidiaries or affiliates of Monsanto Company and G. D. Searle & Co.:

Monsanto

Advent Eurofund Limited [Island of Jersey]
Advent-Techno Venture Investment Corp. N.V. [Netherlands Antilles]
Australian Fluorine Chemicals Pty. Limited [Australia]
Chemstrand Overseas, S.A. [Panama]
Companhia Brasileira de Estireno [Brazil]
Fosbrasil S.A. [Brazil]
Hydrocarbon Products Pty. Ltd. [Australia]
Industrias Resistol, S.A. [Mexico]
K. K. Astro [Japan]
Korag Company Limited [Korea]

Korsil Company Limited [Korea]
Limewood Run-Off Limited [England]
Mitsubishi Monsanto Chemical Company [Japan]
MonGard Ltd. [Bermuda]
Monsanto Chemicals of India Limited [India]
Monsanto Chemicals (Thailand) Limited [Thailand]
Monsanto (Malaysia) Sendirian Berhad [Malaysia]
Monsanto Overseas, S.A. [Panama]
Monsanto Services International S.A. [Belgium]
MonSure Ltd. [Bermuda]
Montal (Insurance) Limited [England]
Nippon Cooper Kabushiki Kaisha [Japan]
Nippon Fisher Company, Ltd. [Japan]
Nomix Manufacturing Company Limited [U.K.]
NutraSweet AG [Switzerland]
Quimica do Triangulo Ltda. [Bermuda]
Revertex Industries (Aust.) Pty. Limited [Australia]
Revertex Industries (N.Z.) Ltd. [New Zealand]
Revinex Australia Limited [Australia]
Ryowa, K.K. [Japan]
Titan Chemicals Limited [New Zealand]
Tsukuba Service Company, Ltd. [Japan]

G. D. Searle

G. D. Searle (Philippines) Inc. [Philippines]
Laboratoires Searle S.A. [France]
Lorex Pharmaceutica B.V. [Netherlands]
Lorex Pharmaceuticals Ltd. [U.K.]
Searle India Ltd. [India]
Searle Korea Limited [Korea]
Searle Pakistan Ltd. [Pakistan]
Searle Yakuhin, K.K. [Japan]

Supreme Court, U.S.
FILED
SEP. 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-326

IN THE

Supreme Court of the United States

G. D. SE[illegible]LE & CO.,

Petitioner,

v.

DEBRA A. and GEORGE SIMON, et al,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Michael V. Ciresi
*Roger P. Brosnahan
Thomas J. Conlin
ROBINS, ZELLE, LARSON & KAPLAN
1800 International Centre
900 Second Avenue South
Minneapolis, Minnesota 55402
(612) 349-8500
Attorneys for Respondents
**Counsel of Record*

1987—Northwest Printing Co., 3010 2nd St. No., Minneapolis, MN 55411—588-7506

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... (ii)

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 6

I. THE COURTS BELOW CORRECTLY CONCLUDED THAT, AFTER REDACTIONS, CERTAIN OF SEARLE'S RISK MANAGEMENT DOCUMENTS ARE NOT ENTITLED TO PROTECTION AS WORK PRODUCT UNDER FED. R. CIV. P. 26(b)(3) AND *HICKMAN* 8

II. THE COURTS BELOW CORRECTLY APPLIED THE MINNESOTA ATTORNEY-CLIENT PRIVILEGE 12

III. THE FACT THAT SEARLE'S PRODUCT HAS INJURED MANY PEOPLE RESULTING IN MULTIPLE CASES DOES NOT JUSTIFY AN EXPANSION OF EITHER THE WORK PRODUCT DOCTRINE OR THE ATTORNEY-CLIENT PRIVILEGE 14

CONCLUSION 16

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Cases:

Brown v. St. Paul City Ry. Co., 62 N.W.2d 688 (Minn. 1954) 6, 7, 12
Diversified Industries, Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977) *on rehearing*, 572 F.2d 606 (8th Cir. 1978) 9
Hickman v. Taylor, 329 U.S. 495 (1947) 7, 8, 10
In Re Grand Jury Investigation (Sun Co.), 599 F.2d 1224, (3rd Cir. 1979) 11
In Re Grand Jury Proceedings (FMC Corporation), 604 F.2d 798, (3rd Cir. 1979) 11
In Re Grand Jury Witness (Salas), 695 F.2d 359 (9th Cir. 1982) 13
Leer v. Chicago, Milwaukee, St. Paul & Pacific Railway Co., 308 N.W.2d 305 (Minn. 1981) 12
Matter of Witness Before the Special March 1980 Grand Jury, 729 F.2d 489 (7th Cir. 1984) 13-14
Mission National Ins. Co. v. Lilly, 112 F.R.D. 160 (D. Minn. 1986) 7
Simon v. Searle, 816 F.2d 397 (8th Cir. 1987), opinion below, Pet. App. 1 7
United States v. Davis, 636 F.2d 1028 (5th Cir. 1981) 8
United States v. El Paso Co., 682 F.2d 530 (5th Cir. 1982) *reh'q denied*, 688 F.2d 840, *cert. denied*, 466 U.S. 944 (1984) 10, 11
United States v. Gulf Oil Corporation, 760 F.2d 292 (Temp. Emer. Ct. App. 1985) 8
Upjohn Co. v. U.S., 449 U.S. 383 (1981) 7

Statutes:

28 U.S.C. § 1292(b) 4
Minn. Stat. § 595.02(2) 12

Rules:

Fed. R. Civ. P. 26(b)(3) 3, 8
Supreme Court Rule 17.1 6-7
Federal Rule of Evidence 501 12

Other Authorities:

8 C. Wright and A. Miller, *Federal Practice and Procedure* § 2024, at 198-199 (1970) 8-9

IN THE

Supreme Court of the United States

No. 87-326

G. D. SEARLE & CO.,

Petitioner,

v.

DEBRA A. and GEORGE SIMON, et al,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATEMENT OF THE CASE

These cases, consolidated for discovery, are products liability cases in which the plaintiffs suffered infection of their reproductive organs — for many causing infertility — as a result of their use of petitioner's product, the Cu-7 intrauterine contraceptive device (IUD). Petitioner G. D. Searle & Co. ("Searle") seeks review of the Eighth Circuit's affirmance of a district court order permitting discovery of certain Searle business documents. The documents which Searle seeks to shield from discovery are "business documents revealing the corporate action, analysis and planning . . .", which "reflect on key issues pertinent to the litigation" because they "relate to the issues of notice, defect

and questions relating to punitive damages." Pet. App. 31, 29. These documents were part of approximately 500 documents reviewed *in camera* by the special master, document-by-document, to evaluate Searle's privilege claims. The special master found more than 220 documents completely protected from discovery because they revealed either litigation work product or confidential attorney-client communications. The special master found others partially protected for the same reasons, and the remainder discoverable in their entirety because they were prepared for business, not litigation purposes, and because they did not reveal confidential attorney-client communications. All case-specific reserve information, and other privileged material, was ordered redacted. Pet. App. 30, 32, 34, 36, 37.

In his reports the special master recognized that Searle's conduct is central to this litigation: "What the corporation knew, the judgments it made with respect to marketing and manufacturing the product are in issue in these cases. These documents are relevant to and are calculated to lead to discoverable evidence on these issues." Pet. App. 29. The special master also specifically recognized not only the relevance of the documents, but also plaintiffs' substantial need for the documents:

> The materials reflect on key issues pertinent to this litigation. To prove these issues the parties must have these business documents revealing the corporation action, analysis, and planning.

Pet. App. 31. The special master found that "[n]one of the documents reviewed involve Risk Management giving legal advice or playing a role in specific litigation strategy in any of the cases." Pet. App. 28.

After the special master issued his reports, the district court conducted a hearing involving both parties and the special master, during which the court examined the special master with respect to his findings. The special master stated:

> [I]f you are going to litigate corporation action, the key to corporate action are the documents that are created in the corporate committees—the documents going back and forth, the budget decisions—that these represent the corporate action and the corporate decision making; and that the documents that we are talking about, then, are key to the decisions that were made by the corporation at this particular point in time. And I am not sure that you can duplicate this information by asking various officers what they thought at a particular point in time. The documents are what you are going to need to establish what the corporation as an entity knew, what the corporation did; and the decisions that the corporation made are reflected in these documents. So I do view them as key.

Resp. App. 2.

Finally, as an alternative ground for production, the special master specifically found that the plaintiffs had established substantial need and undue hardship pursuant to Fed. R. Civ. P. 26(b)(3), even assuming the documents were work product:

> If the court concludes they are work product, I would conclude that they are far removed from the attorney's strategy about a particular case, and they reflect more general business strategy of the corporation, and because of the necessity for proving what the corporation knew and what the corporation did, I believe that the standard has been met by the plaintiffs to produce this ordinary work product.

Resp. App. 2-3; *see, also,* Pet. App. 31, Report (I) of Special Master.

The district court carefully reviewed the special master's factual findings and legal analysis and adopted them, including the special master's redactions. The district court did, however, grant Searle's request for certification pursuant to 28 U.S.C. § 1292(b). The certified issues confirmed that only "some portions of the documents" at issue contain aggregate reserve information. *See* Pet. App. 38-39, issue 1.

On appeal, Searle filed *in camera* with the Eighth Circuit six documents which it claimed were representative of the others held discoverable. Searle unilaterally selected the six documents—without review by the district court or special master to insure that the "sample" was truly representative. Moreover, Searle did not redact any of the documents in accordance with the redactions ordered by the district court before filing them with the Eighth Circuit. Basic principles of advocacy, as well as common sense, practically assure that the documents selected by Searle were the least inculpatory of those documents found discoverable. Indeed, it appears that Searle's unsolicited selection was heavily weighted with aggregate reserve documents, as opposed to documents relating to notice, defect and punitive damages, allowing Searle to bootstrap its argument on appeal.

Despite Searle's unilateral *in camera* submission of the six documents, the Eighth Circuit concluded that the special master and the district court properly applied the correct law and made reasonable factual findings with respect to both the work product doctrine and the attorney-client privilege. The Eighth Circuit specifically rejected Searle's claim that the individual case reserves and the aggregate

case reserves are indistinguishable for the purpose of applying the work product doctrine:

> Although the risk management documents were not themselves prepared in anticipation of litigation, they may be protected from discovery to the extent that they disclosed the individual case reserves calculated by Searle's attorneys. The individual case reserve figures reveal the mental impressions, thoughts, and conclusions of an attorney in evaluating a legal claim. By their very nature they are prepared in anticipation of litigation and, consequently, they are protected from discovery as opinion work product. . . . The individual figures lose their identity when combined to create the aggregate information. Furthermore, the aggregates are not even direct compilations of the individual figures; the aggregate information is the product of a formula that factors in variables such as inflation, further diluting the individual reserve figures. Certainly it would be impossible to trace back and uncover the reserve for any individual case, and it would be a dubious undertaking to attempt to derive meaningful averages from the aggregates, given the possibility of large variations in case estimates for everything from frivolous suits to those with the most serious injuries.

Pet. App. 8.

Elsewhere the court noted: "Clairvoyants aside, no one will learn from the aggregate reserve figures what Searle's attorneys were thinking when they set individual case reserves." Pet. App. 9.

Concerning Searle's attorney-client privilege claims, the Eighth Circuit concluded that the special master had recognized and correctly applied the proper legal principles:

> Relying on *Brown v. St. Paul City Ry. Co.*, 62 N.W.2d 688 (Minn. 1954), the special master stated: "A business document is not made privileged by providing a copy to counsel. * * * Thus, those documents from one corporate officer to another with a copy sent to an attorney do not qualify as attorney client communications." We perceive no error in this statement of the law, which appears to have been carefully applied by the special master to the point of redacting sections of privileged material from within the individual documents.

Pet. App. 11.

The Eighth Circuit therefore affirmed the district court. According Searle even further protection, the Eighth Circuit directed the district court to again review the documents to ensure that no work product or confidential communications are disclosed in the documents after redaction. Before this re-review was even undertaken, Searle petitioned the Eighth Circuit for a rehearing, which was denied.

REASONS FOR DENYING THE WRIT

Under Rule 17 of the United States Supreme Court Rules, this Court will grant a writ of certiorari "only when there are special and important reasons therefore." These reasons include:

> When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; . . . [or] [w]hen a state court or a federal court of appeals has decided an important question of federal law which has not been but should be settled

> by this Court, or has decided a federal question in a way in conflict with the applicable decisions of this Court.

Supreme Court Rule 17.1.

The Eighth Circuit's decision to affirm limited production of Searle's risk management files establishes no new principles of law and is entirely consistent with this Court's decisions in *Hickman v. Taylor* and *Upjohn Co. v. U.S.*, and with decisions of other federal courts of appeals and the Minnesota Supreme Court. These courts recognize that application of the work product doctrine and the attorney-client privilege is fact-specific. *See, e.g., Upjohn Co. v. U.S.*, 449 U.S. 395, 397 (1981) (while a case-by-case analysis of the attorney-client privilege "may to some slight extent undermine desirable certainty in the boundaries of the attorney-client privilege, it obeys the spirit of the rules"); *Brown v. St. Paul City Ry. Co.*, 62 N.W.2d 688, 701 (Minn. 1954) ("whether a document or communication is privileged is a question of fact"); *Simon v. Searle, opinion below*, Pet. App. 6 ("determination of whether the documents were prepared in anticipation of litigation is clearly a factual determination"); *Mission National Ins. Co. v. Lilly*, 112 F.R.D. 160, 163 (D. Minn. 1986) (in analyzing work product claims, the "most sound" approach is a case-by-case analysis considering the unique factual context of the given problem").

The instant case presents only a factual dispute, not an important question of federal law. There are no special and important reasons for a grant of certiorari, and Searle's petition should be denied.

I.

The Courts Below Correctly Concluded That, After Redactions, Certain of Searle's Risk Management Documents Are Not Entitled to Protection as Work Product Under Fed. R. Civ. P. 26(b)(3) and *Hickman*.

The work product doctrine was first established in *Hickman v. Taylor*, 329 U.S. 495 (1947), and is now codified in Fed. R. Civ. P. 26(b)(3). Materials assembled in the "ordinary course of business . . . or for other non-litigation purposes" are not immune from discovery by the work product doctrine. Fed. R. Civ. P. 26(b)(3) Advisory Committee Notes. The threshold factual question in applying the doctrine is determination of the primary motivating purpose of the document:

> Our inquiry should be to determine "the primary motivating purpose behind the creation of a document." *See United States v. Davis*, 636 F.2d 1028, 1040 (5th Cir. 1981). If the primary motivating purpose behind the creation of a document is not to assist in pending or impending litigation, then a finding that the document enjoys work-product immunity is not mandated.

United States v. Gulf Oil Corporation, 760 F.2d 292, 296 (Temp. Emer. Ct. App. 1985). In the words of Professors Wright and Miller:

> [T]he test should be whether, *in light of the nature of the document and the factual situation in the particular case*, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. But the converse is that even though litigation is already in prospect, there is no work product immunity for documents prepared in the regular course of business rather than for purposes of litigation.

8 C. Wright and A. Miller, *Federal Practice and Procedure* § 2024, at 198-199 (1970) (emphasis supplied), adopted by *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 604 (8th Cir. 1977), *on rehearing*, 572 F.2d 606 (8th Cir. 1978) (en banc).

Based on its review of Searle's affidavits, document summaries, briefs, and the "sample" documents submitted *in camera* by Searle, as well as the findings of the district court and the special master, the court of appeals affirmed the district court's ruling protecting individual case reserves calculated by Searle's attorneys, Pet. App. 8, but also agreed that documents prepared by Searle's risk management department were not prepared in anticipation of litigation, since that department "was not involved in giving legal advice or in mapping litigation strategy in any individual case." Pet. App. 7. According to the court of appeals, the district court's finding that Searle's risk management documents "are in the nature of business planning documents" was a "reasonable factual conclusion." Pet. App. 7.[1]

The special master found, and the district court and the Eighth Circuit agreed, that the connection between aggregate reserve information and individual case reserves was too attenuated to permit inferring specific reserves from the aggregate. Because aggregate reserve information reflects not only actual pending cases, but also potential cases, and because some of the reserve information includes products other than the Cu-7, it will be mathematically impossible for

[1]The special master concluded, in the alternative, that even if aggregate reserves revealed in Searle's risk management documents constituted work product, it was "ordinary work product subject to the substantial need and undue hardship requirement." The special master found that the plaintiffs had met this burden, since to prove the "key issues" in this litigation, plaintiffs "must have these business documents revealing the corporate action, analysis and planning." Pet. App. 31.

plaintiffs to ascertain specific Cu-7 reserves from the aggregate.[2] Searle's objection that in permitting access to aggregate reserve information, the court permitted limited disclosure of protected work product is a distortion of the record. The court ordered production of documents containing aggregate reserve information precisely because the information did *not* disclose, directly or indirectly, protected work product.

Instead of departing from the principles of *Hickman v. Taylor*, the district court and the Eighth Circuit steadfastly adhered to them. In *Hickman*, this court explained that the purpose of work product protection was to ensure the "proper preparation of a client's case." *Hickman*, 329 U.S. at 511. As the Eighth Circuit concluded, with case specific information redacted, disclosure of documents discussing litigation reserve planning conducted by non-lawyer company employees reveals nothing about an attorney's preparation of a specific case: "Clairvoyants aside, no one will learn from the aggregate reserve figures what Searle's attorneys were thinking when they set individual case reserves." Pet. App. 9.

In an analogous case, in which this Court denied a petition for certiorari, the Fifth Circuit ruled that a taxpayer's "tax pool analysis," prepared by attorneys and accountants to identify potential tax liabilities and to set aside reserve funds to cover these contingent liabilities, was not immune from discovery by the work product doctrine. *United States v. El Paso Co.*, 682 F.2d 530 (5th Cir. 1982), *reh'g denied*, 688 F.2d 840, *cert. denied*, 466 U.S. 944 (1984). The Fifth Circuit held that documents prepared by a team of accountants and lawyers which discussed those areas in

---

[2]The special master specifically directed redaction of those portions of documents which reveal methodology for figuring reserves. Pet. App. 34, n. 10.

which the corporation, in preparing its tax return, had taken a position that might result in litigation were not prepared "in anticipation of litigation," but rather, "in the ordinary course of business." According to the court:

> The primary motivating force behind the tax pool analysis, therefore, is not to ready El Paso for litigation over its tax returns. Rather, the primary motivation is to anticipate, for financial reporting purposes, what the impact of litigation might be on the company's tax liability. El Paso thus creates the tax pool analysis with an eye on its business needs, not on its legal ones.

Id. at 543. Like El Paso's tax pool analysis, Searle's risk management documents were not prepared to help defend litigation but rather for business planning purposes, and therefore must be produced. This Court recognized in *El Paso* that no legal issues worthy of its consideration were presented and denied El Paso's petition for certiorari.

As the courts have recognized, "[b]ecause the work product doctrine obstructs the search for truth and because its benefits are, at best, 'indirect and speculative,' it must be 'strictly confined within the narrowest possible limits consistent with the logic of its principles.'" *In Re Grand Jury Proceedings (FMC Corporation),* 604 F.2d 798, 802-803 (3rd Cir. 1979), *quoting from In Re Grand Jury Investigation (Sun Co.),* 599 F.2d 1223, 1235 (3rd Cir. 1979). This court should deny Searle's petition because the courts below properly analyzed and applied well-established work product principles.

II.

The Courts Below Correctly Applied the Minnesota Attorney-Client Privilege.

Federal Rule of Evidence 501 provides that evidentiary privileges are determined by state law in diversity actions. The Minnesota attorney-client privilege, codified in Minn. Stat. § 595.02(2) provides:

> An attorney cannot, without the consent of the attorney's client, be examined as to any communication made by the client to him or his advice given thereon in the course of professional duty; nor can any employee of the attorney be examined as to the communication or advice, without the client's consent.

Because the attorney-client privilege is a barrier to disclosure and tends to suppress relevant facts, the privilege must be "strictly construed." *Leer v. Chicago, Milwaukee, St. Paul & Pacific Railway Co.*, 308 N.W.2d 305, 309 (Minn. 1981). Furthermore, the privilege does not apply at all unless the client communicates confidential information to the attorney *for the purpose* of obtaining legal advice. *Brown v. St. Paul City Ry. Co.*, 62 N.W.2d 688, 700 (Minn. 1954).

Based on these principles, the special master carefully reviewed each of the disputed documents and shielded from disclosure all of those documents, or portions of documents, which would reveal confidential communications from Searle to its attorneys communicated for the purpose of obtaining legal advice. The district court properly refused to apply the attorney-client privilege to certain business documents which were simply copied to attorneys without either an express or implied request for legal advice or

services. Pet. App. 31. The Eighth Circuit agreed, noting that the special master appeared even to have applied the principle that requests for legal advice can sometimes be implied from delivery of a document to an attorney. Pet. App. 11-12. Such was not the case here.

Searle contends that the Eighth Circuit's ruling conflicts with a number of decisions holding that the attorney-client privilege attaches to communications not only from attorneys to clients but also from clients to attorneys. There is no dispute that the attorney-client privilege may, under proper circumstances, protect communications running in both directions. The Eighth Circuit did not hold otherwise. The Eighth Circuit simply recognized, as did the district court, that not all communications between attorney and client are protected. Before the attorney-client privilege will apply to protect documents, the documents must reveal in some way information communicated by a client to an attorney, in confidence, *for the purpose* of requesting or assisting in obtaining legal advice. The documents at issue reveal no such communications.

The cases cited by Searle recognize that the privilege is not absolute, but protects only documents which reveal the nature of the legal services provided or confidential information communicated in a request for legal services. In *In Re Grand Jury Witness (Salas)*, 695 F.2d 359 (9th Cir. 1982), for example, the Ninth Circuit did *not* hold that all of the bills, ledgers, statements and attorney time records involved were necessarily protected. Rather, the court ordered a document-by-document *in camera* inspection by the district court to segregate material which revealed the nature of the legal services provided. Likewise, in *Matter of Witnesses Before the Special March 1980 Grand Jury*,

729 F.2d 489, 495 (7th Cir. 1984), the court rejected a blanket rule of privilege for attorney-client communications, remanding so that the district court could inspect each document for privileged material. As in these cases, the proper procedure for the district court here was to examine Searle's documents one-by-one and redact information revealing confidential information communicated for the purpose of obtaining legal advice. The special master did this, in scrupulous detail.[3]

III.

The Fact That Searle's Product Has Injured Many People Resulting in Multiple Cases Does Not Justify An Expansion of Either The Work Product Doctrine or The Attorney-Client Privilege.

In an attempt to fashion a dispute worthy of this Court's attention, Searle argues in its petition that the work product doctrine and the attorney-client privilege must be revamped merely because this case involves approximately 50 separate actions, consolidated for discovery. In an attempt to construe what is truly a factual inquiry as a legal issue of tremendous import, Searle hypothesizes that plaintiffs in these and other cases will use Searle's documents on a collective, national scale to coerce inflated settlements. This hypothesis is sheer myth, with no support in the record or in logic.

The Eighth Circuit agreed with the district court that no one could possibly discern case specific reserves from Searle's aggregate reserves, which are arrived at by a complicated formula. No plaintiff's attorney will attempt to

---

[3]The special master was so protective of Searle's rights that he also ordered plaintiffs to return to Searle privileged documents which Searle had voluntarily but inadvertently produced. Pet. App. 33.

negotiate settlement on the basis of aggregate or average reserve figures because the extent of injuries in these cases varies as widely as the number of plaintiffs. Moreover, if the average reserve is artificially low by virtue of Searle's calculations, most cases will settle above the reserves. If the converse is true, most cases will settle below the reserve. In short, the settlement process will be conducted independently of the reserves calculated by Searle.

Searle suggests that Cu-7 plaintiffs nationwide will band together to demand that Searle offer its aggregate reserves in settlement of the Cu-7 cases nationwide. Nothing in the record supports this suggestion. Plaintiffs have coordinated discovery efforts in an attempt to match Searle's resources. However, plaintiffs have not coordinated settlement efforts. It is simply inconceivable that hundreds of plaintiffs nationwide would agree that the aggregate reserves constitute adequate compensation, or would agree how to apportion the aggregate reserve figure. These cases, while sharing certain common issues of liability, are individual cases — not a class action. Thus, although Searle's IUD has injured many people, the essential fact remains that each individual client retains ultimate settlement authority.

CONCLUSION

Searle's petition raises no questions of law but rather challenges the application of established work product and attorney-client privilege principles to specific documents. Searle's documents have been accorded scrupulous protection by the trial and appellate courts. Because the courts below faithfully followed the precedents of this Court, other federal courts, and the Minnesota Supreme Court, Searle's petition for certiorari should be denied.

Respectfully submitted,

ROBINS, ZELLE, LARSON
& KAPLAN
Michael V. Ciresi
*Roger P. Brosnahan
Thomas J. Conlin
1800 International Centre
900 Second Avenue South
Minneapolis, Minnesota
55402
(612) 349-8500
Attorneys for Respondent
**Counsel of Record*

Dated September 28, 1987.

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
CV 4-80-160, et al

Debra A. and George Simon, et al,

Plaintiffs,

vs.

G. D. Searle & Co.,

Defendant.

September 24, 1984

MOTIONS

Transcript of proceedings before Chief Federal District Judge Miles W. Lord at Minneapolis, Minnesota, on September 24, 1984.

APPEARANCES:

For Plaintiffs:
Leo Feeney and Tom Christianson.
Douglas Muirhead

For Defendant:
Clifford Greene and Gregory Wilmes.

[23] Nothing was presented to me by the parties to indicate which documents these would be cumulative with respect to.

I made my findings based on what was presented, and I didn't think that it would be incumbent upon me at that

point to make an independent inquiry into the other thousands of documents that were produced.

The argument was raised.

I didn't see any other documents that these would be cumulative of.

Secondly, if you are going to litigate corporate action, the key to corporate action are the documents that are created in the corporate committees — the documents going back and forth, the budget decisions — that these represent the corporate action and the corporate decision making; and that the documents that we are talking about, then, are key to the decisions that were made by the corporation at this particular point in time.

And I am not sure that you can duplicate this information by asking various officers what they thought at a particular point in time.

The documents are what you are going to need to establish what the corporation as an entity knew, what the corporation did; and the decisions that the [24] corporation made are reflected in these documents.

So I do view them as key.

Also, this ruling was in the alternative.

My initial determination was that, since these documents — that are represented in paragraph 3 — are not prepared in anticipation of litigation but are prepared for business purposes, that the documents themselves aren't work product.

This is an alternative.

If the court concludes they are work product, I would conclude they are far removed from the attorney's strategy about a particular case, and they reflect more general business strategy of the corporation, and because of the necessity

for proving what the corporation knew and what the corporation did, I believe that the standard has been met by the plaintiffs to produce this ordinary work product.

MR GREEN: Your Honor, I won't go over old ground with regard to some of the initial conclusions relating to this ruling, but I do think that we have been — in my opinion — overly inclusive in our efforts to get documents to the plaintiffs that deal on the issue of corporation decision making.

THE COURT: Let's be specific.

Take a document that you have that you are

* * *

FILED
OCT 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-326

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

G. D. SEARLE & CO.,

Petitioner,

v.

DEBRA A. and GEORGE SIMON, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

LAURA A. KASTER *
ROSS B. BRICKER
HOWARD S. SUSKIN
VILIA M. DEDINAS
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350
Attorneys for Petitioner

Of Counsel:

GREGORY L. WILMES
FRUTH & ANTHONY, P.A.
1350 International Center
900 Second Avenue South
Minneapolis, Minnesota 55402
(612) 349-6969

* Counsel of Record

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
ARGUMENT	1
CONCLUSION	7

TABLE OF AUTHORITIES

Cases	PAGE
Hickman v. Taylor, 329 U.S. 495 (1947)	3, 5
United States v. El Paso Co., 682 F.2d 530 (5th Cir. 1982), *cert. denied*, 466 U.S. 944 (1984) ...	4
Upjohn Co. v. United States, 449 U.S. 383 (1981) .	3

No. 87-326

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

G. D. SEARLE & CO.,

Petitioner,

v.

DEBRA A. and GEORGE SIMON, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioner G.D. Searle & Co. ("Searle") respectfully submits this reply brief in further support of its petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

1. Searle's petition raises substantial legal issues concerning whether, in pending mass tort litigation, lawyers coordinating the claims of many plaintiffs can compel disclosure of a defendant's aggregate estimates of litigation reserves which are based on the defendant's attorney's assessment of the settlement value of, and anticipated litigation expenses to defend against, individual plaintiff's

claims. Respondents argue in opposition that these issues "present[ ] only a factual dispute, not an important question of federal law." (Br. Opp. at 7.) This argument is untenable. The scope of the legal protection afforded Searle's attorneys' work product and privileged communications presents legal not factual issues. Moreover, the facts giving rise to this dispute are not unique; they are common to the vast majority of mass tort cases.

The issues presented by Searle's petition affect practically all companies facing mass tort product liability claims. As the five amici curiae representing thousands of companies substantiate, the procedures followed by Searle in setting aggregate case reserves are common to many companies; indeed, most businesses faced with mass tort claims customarily utilize procedures that are similar, if not identical, to those followed by Searle.[1] The practice of setting aggregate case reserves has become a virtual necessity for these businesses in the wake of the recent explosive rate of growth in mass tort litigation in this country, a phenomenon whose existence respondents do not dispute. The practice is a means to assist in planning the strategy of litigation and settlement, and assures that there will be funds for a potential recovery, if any. Far from being isolated or fact-specific, the legal issues presented here are echoed in tens of thousands of lawsuits nationwide. The outcome of this case will have enormous impact.

---

[1] *See* Brief Amicus Curiae of Chamber of Commerce of the United States in Support of Petition for Certiorari, at 3-4; Brief Amicus Curiae of Pharmaceutical Manufacturers Association in Support of Petition for Certiorari, at 2-3; Brief Amicus Curiae of American Insurance Association in Support of Petition for Certiorari, at 2.

2. In its petition for a writ of certiorari, Searle demonstrated that the Eighth Circuit's unprecedented decision to compel disclosure of confidential aggregate case reserves, despite plaintiffs' failure to make any showing of need for them, directly conflicts with this Court's teachings in *Hickman v. Taylor*, 329 U.S. 495 (1947), and *Upjohn Co. v. United States*, 449 U.S. 383 (1981), as well as the holdings of all other courts of appeals which have addressed this issue. Respondents' assertion (Br. Opp. at 4) that "factual findings" by a special master concerning the documents' relevance and plaintiffs' alleged need for them were adopted by the court of appeals is patently false; the court of appeals actually rebuffed any such findings. (App. 15.) Indeed, the court of appeals acknowledged that Searle's aggregate case reserves, which were reflected in the sample documents submitted to the Court and are unrelated to the manufacturing and marketing of Searle's products, would afford plaintiffs "nothing in the way of admissible evidence on the issue of liability or on the issue of damages." (App. 15.) Thus, contrary to respondents' misstatement, the Eighth Circuit did *not* hold that the aggregate case reserves were relevant or calculated to lead to discoverable evidence, nor did the court of appeals determine that plaintiffs had any substantial need for them.

Plaintiffs have never offered proof of need for this confidential information, and none exists. Instead, plaintiffs merely have advanced self-serving promises that "no plaintiff's attorney will attempt to negotiate settlement on the basis of aggregate or average reserve figures" (Br. Opp. at 14-15); but plaintiffs never explain what other possible purpose the aggregate reserve information might have. By compelling disclosure of Searle's confidential aggregate case reserves even though plaintiffs failed to make

any showing of need, let alone the extraordinary need required to discover attorneys' mental impressions, the Eighth Circuit eviscerated the special, almost absolute, protection traditionally accorded opinion work product.

3. Respondents also rely upon the inapposite decision in *United States v. El Paso Co.*, 682 F.2d 530 (5th Cir. 1982), *cert. denied*, 466 U.S. 944 (1984) (Br. Opp. at 10-11). In *El Paso*, the issue was whether the work product doctrine covers tax accrual work papers about which attorneys were not consulted and which were not prepared in anticipation of any litigation or in connection with any pending litigation. *El Paso*, 682 F.2d at 534-35, 543. Unlike the tax accrual work papers in *El Paso*, Searle's aggregate case reserve documents are prepared with the input of Searle's legal counsel, who assess and form opinions based on individual case reserves in litigation that already has been filed against the company. (Affidavit of Eugene W. Bader, June 8, 1984, Para. 9.) Indeed, the special master specifically found that Searle's aggregate case reserves revealed "to some extent" the methodology of its attorneys in setting the individual case reserves and that "[p]laintiffs could take an aggregate reserve and determine an average reserve per case, which arguably gives plaintiffs some insight into Searle's attorneys' thought processes of setting reserves." (App. 31, 39.) As Judge Gibson recognized in his dissent, there is "a deep inconsistency" in the majority's "protecting the parts but determining that the sum of the parts and calculations based upon the protected figures are not protected" particularly where, as here, "within the increasingly common context of mass products liability litigation, the aggregate and average figures may take on even greater significance." (App. 15, 21.)

Searle's aggregate case reserves reflect confidential attorney-client communications and are prepared in anticipation of litigation. As the numerical representation of the value of these cases, they are the paradigm of opinion work product.

4. Respondents attempt to justify the Eighth Circuit's novel ruling by arguing that the attorney-client privilege and work product doctrine improperly restrict discovery and therefore should be curtailed. They wrongly charge that the benefits of the attorney-client privilege and the work product protections are "indirect and speculative", and that the protections "obstruct the search for truth." (Opp. Br. at 11.) While the Eighth Circuit's opinion may reflect the same underlying hostility to these protections, that hostility is contrary to this Court's well established precedent. The protections accorded such privileged information are rooted in sound principles of litigation fairness and public policy and should not be subject to novel restrictions which have a disparate impact on litigants faced with multiple suits as opposed to litigants faced with one or two cases. This Court's teachings in *Hickman v. Taylor*, 329 U.S. 495 (1947), and its progeny, recognize that a litigant attempting to consider all the factors that bear upon the decision to try or settle lawsuits would be placed at a severe and unfair disadvantage if the litigant could be compelled to divulge to its adversary confidential assessments of liability in ongoing litigation.

By compelling disclosure of aggregate case reserves, the Eighth Circuit has seriously handicapped all businesses defending mass tort cases and others engaged in multiple court cases. Under this ruling, businesses will be unable to communicate with their attorneys, to finance and plan for their defense, and to consider properly all

the factors that bear upon the decision to settle or try lawsuits. Plaintiffs have failed to explain how any public policy is served by requiring disclosure of this confidential information.

5. It is noteworthy that not even respondents embrace the Eighth Circuit's unprecedented conclusion that a defendant forced into mass tort litigation may have its business redefined by a court as the "business of litigation" and thereby lose the attorney-client privilege and work product protection routinely afforded other less frequently sued defendants. But that conclusion is the central underpinning for the Eighth Circuit's ruling. If the Eighth Circuit's holding is allowed to stand, it will completely confound the rule that documents prepared in anticipation of litigation are entitled to protection from compelled disclosure. Many litigants commonly face recurring litigation—including United States government enforcement agencies, regulated industries, liability insurers, manufacturers of consumer products, large scale employers, and securities brokers. Under the Eighth Circuit's novel logic, such government enforcement agencies and private concerns alike may be deemed to be in the "business of litigation" and therefore not entitled to invoke attorney-client privilege or work product protection for any litigation document shared with management.

No court has ever so eviscerated both the work product doctrine and the attorney-client privilege. Given the importance of the issues raised, the grave threat to the orderly administration of justice presented by the lower court's decision, and the manifest need for uniformity among the Circuits concerning the application in mass tort litigation of the work product and attorney-client privilege protections, review by this Court is warranted.

CONCLUSION

For the foregoing reasons, G.D. Searle & Co. respectfully urges that this petition for a writ of certiorari be granted.

Respectfully submitted,

LAURA A. KASTER *
ROSS B. BRICKER
HOWARD S. SUSKIN
VILIA M. DEDINAS
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

Attorneys for Petitioner

Of Counsel:

GREGORY L. WILMES
FRUTH & ANTHONY, P.A.
1350 International Center
900 Second Avenue South
Minneapolis, Minnesota 55402
(612) 349-6969

* Counsel of Record

Dated: October 8, 1987

87-326

NO. 84-1601

MOTION FILED
SEP 25 1987

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

G. D. SEARLE & CO.,

Petitioner,

versus

DEBRA A. and GEORGE SIMON, et al.,

Respondents.

Amicus Brief of The Defense Research Institute
and Trial Lawyers Association
in Support of Petitioner
G. D. Searle & Co.

Donald F. Pierce
Davis Carr
The Defense Research Institute
and Trial Lawyers Association
c/o Post Office Box 123
Mobile, Alabama 36601
(205) 432-5511

TABLE OF CONTENTS

Page

Table of Authorities ii

Statement of Interest 1

Statement of Issues and Statement of the Case 3

Argument

A. THE DOCUMENTS SOUGHT ARE NOT WITHIN THE SCOPE OF DISCOVERY 4

B. WORK PRODUCT PROTECTS THE DOCUMENTS FROM DISCLOSURE. 8

C. THE DOCUMENTS FALL WITHIN THE SCOPE OF ATTORNEY-CLIENT COMMUNICATIONS. 15

Conclusion 18

Certificate of Service 19

TABLE OF AUTHORITIES

Pages:

Cases:

Hickman v. Taylor, 329 U.S. 495 (1947) 4, 6, 10 11, 12, 13, 15

Matter of Fischel, 557 F.2d 209 (9th Cir. 1977) 16

Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978) 6

Shelton v. American Motors Corp., 805 F.2d 1323 (8th Cir. 1986) 14

Sporck v. Piel, 759 F.2d 312 (3rd Cir.) *cert. denied* _____ U.S. _____, (106 S.Ct. 232) (1985) 9, 13

United States v. Nobles, 422 U.S. 225 (1975) 10

United States v. Proctor & Gamble Co., 356 U.S. 677 (1958) 5

Upjohn Co. v. United States, 449 U.S. 383 (1981) 16

Other Authority:

Federal Rules of Civil Procedure, Rule 26 ..... 5, 6, 7, 8 9, 10, 12

Federal Rules of Evidence, Rule 401 5

Weinstein's Evidence, ¶ 503 [02] 16

STATEMENT OF INTEREST

The Defense Research Institute and Trial Lawyers Association (DRI) respectfully moves for leave to file the attached brief *amicus curiae* in support of G. D. Searle and Company, the Petitioner, as provided in Rules 36.3 and 42 of the rules of this Court. Petitioner has consented through its attorneys to the filing of this brief. Respondents' attorneys have refused such consent.

DRI is a national association of approximately 13,000 members including defense trial lawyers, judges, law professors, and corporate and insurance company members. Our membership consists principally of individual trial lawyers in private practice who usually represent defendants. One of the purposes of DRI is to work to preserve and improve the civil justice system as a means of resolving civil damage disputed fairly, efficiently and promptly.

The economic burden of mass tort litigation is a reality. A major factor in the ultimate cost of defense is the expense of discovery, including responding to requests for the production of documents. In this litigation, some 500,000 documents have been produced. The court has required Searle to produce "each and every document contained in it's files which relates to the CU-7 IUD". It is suggested that inherent in every such request is the opportunity for abuse of the discovery process.

The example of discovery abuse is not the real and present danger presented by this litigation, however. The significance of the issue before the court is the further erosion of the attorney-client confidential relationship. The opportunity to mount a meritorious defense using the full resources available to a defendant through its legal and risk management services must be preserved if the adversarial system is to

function. This litigation affords a vehicle for a definitive decision of a defendant's right to muster its resources in it's defense. It is in response to this challenge of the right to defend that DRI seeks to file this brief.

STATEMENT OF ISSUES AND STATEMENT OF THE CASE

The statement of issues and statement of the case presented by Searle in brief are adopted.

ARGUMENT

A. THE DOCUMENTS SOUGHT ARE NOT WITHIN THE SCOPE OF DISCOVERY

The purpose of discovery under the Federal Rules of Civil Procedure is to allow both parties to have access to all of the facts relevant to a particular case. The United States Supreme Court stated in *Hickman v. Taylor*, 329 U.S. 495 (1947), that the methods of discovery were to:

> Serve (1) as a device, along with the pretrial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus, civil trials no longer need to be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial.

329 U.S. at 501 (footnotes omitted). Thus, the policy behind the discovery rules is to get the facts out, and therefore the rules will "be accorded a broad and a liberal treatment". 329 U.S. at 507. The major concern behind the discovery rules and the broad scope of discovery in particular is the desire for proper or fair litigation:

> Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage

> at which the disclosure can be completed from the time of trial to the period preceding it, thus reducing the possibility of surprise. But discovery, like all matters of procedure, has ultimate and necessary boundaries.

329 U.S. at 507. Notice that the policy behind discovery is the disclosure of *relevant facts* in order to eliminate surprise *at trial*, thus resulting in fair litigation. Rule 26(b)(1) provides for discovery of any "matter, not privileged, which is relevant to the subject matter involved in the pending action." Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401 of the Federal Rules of Evidence. The issues of the cases at hand concern liability and damages, and certainly Searle's risk assessments of the litigation has no tendency to make the existence of any of these issues more or less probable. These documents would not in any way tend to make for a fair trial, because none of the documents deal with facts that could be put before a judge or jury. These documents would rather only aid the plaintiff's counsel in negotiating for a settlement, clearly giving him an unfair advantage in such negotiations while not furthering at all the policy behind discovery - a fair trial.

In *United States v. Proctor & Gamble Co.*, 356 U.S. 677 (1958), the court reiterated that the policy behind discovery is to "make a trial less a game of blind man's bluff and more a fair contest with basic issues and facts disclosed to the fullest practicable extent." 356 U.S. at 682. Thus the object of discovery is to make the trial a fair contest, not to enhance one party's position in settlement negotiations by giving him access to information completely irrelevant to the facts to be determined at trial. An attorney's assessment of the risk of

litigation is just such irrelevant information. As the Supreme Court pointed out in *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978), in dealing with the scope of discovery, the "key phrase in this definition - 'relevant to the subject matter involved in the pending action' - has been construed broadly to encompass any matter that bears on, or that reasonably could lead to a matter that could bear on any issue that is or may be relevant in the case." 437 U.S. at 351. (citing *Hickman*). But at the same time the court recognized that within the phrase were boundaries which could not be ignored:

> Discovery of matter not "reasonably calculated to lead to discovery of admissible evidence" is not within the scope of Rule 26 (b)(1). . . . For the same reason, an amendment to Rule 26(b) was required to bring within the scope of discovery the existence and contents of insurance agreements under which an insurer may be liable to satisfy judgment against the defendant, for that information ordinarily cannot be considered, and will not lead to information that could be considered, by any court or jury deciding any issue.

437 U.S. at 351-52. Likewise, the reserves in this case as well as the risk management studies are not such materials as would be "reasonably calculated to lead to the discovery of admissible evidence" and therefore do not fall within the scope of discovery under 26(b)(1). Such documents are clearly irrelevant, for they have nothing to do with liability or damages, just as the existence of insurance is irrelevant on either of these issues.

Finally, Rule 26(g) requires every discovery request or response or objection to be signed by an attorney of record.

The signature constitutes a certification, that, among other things, the request is: ". . . (3) Not unreasonable . . . given the needs of the case, the discovery already had in the case, the amount in controversy and the importance of the issues at stake in the litigation." All discovery requests made under the authority of Rule 26 are necessarily limited by the requirements of subsection (g) and the certification of counsel.

Applying the prohibition of subsection (g) leads to the conclusion that this discovery request for petitioner's reserve calculations and procedures must be measured by the "needs of the case". It is suggested that the needs of the case limitation may be reasonably imposed upon the further restriction that discovery of admissible evidence. When the request for Searle's reserve calculations and procedures is evaluated within the limitations suggested, a fair interpretation of the request and the rule logically leads to the denial of the request for the information without any consideration of work product or other claim of confidentiality. The court is not confronted with the issue that evidence touching an element of the plaintiff's causes of action or a defense interposed by the defendant will remain undiscovered. This need of the case certification then is undoubtedly based upon a factor other than the discovery of relevant facts relating to the issues to be litigated. The risk management studies and aggregate reserves of Searle, both of which involved Searle's attorneys' legal opinions concerning the risk of litigation, do not fall within the category of relevant facts necessary for the trial.

The reality of modern communication within the American corporate structure requires the reduction of information to written documents. The transmission of information between those charged with the responsibility of decision making is crucial to the judgmental processes which allow a

business to function. Protection of the message communicated between the lawyers and the decision-makers allows free and independent exchange of recommendations and considerations to enable the employment of available resources and for appropriate planning.

The logic of allowing discovery of design planning, manufacturing procedures, marketing strategy, quality control mechanism, advertising, etc., all of which relate to the product and the consumer in the marketplace, is reasonable and should be anticipated. The process which allows the defendant to fully utilize it's legal and risk management personnel in its defense must be protected and remain confidential, absent some showing of mandating a contrary result. The system of civil justice will be poorly served if discovery of information of the character sought in the instant litigation is permitted. Defendant corporations will be denied the opportunity to fully utilize the talents of those employed in procedures if communication must be inhibited by the threat of loss of confidentiality and the subsequent discovery of the strategy for economic planning for the resolution of litigation.

B. WORK PRODUCT PROTECTS THE DOCUMENTS FROM DISCLOSURE.

A further limitation on the scope of discovery is the work product rule:

> Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative

> (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Rule 26(b)(3) of the Federal Rules of Civil Procedure. Although the work product rule limits the scope of discovery, it furthers the policy behind discovery, the policy of making for a fair trial. This rule provides for the protection of documents and other tangible things, otherwise relevant and non-privileged, prepared in anticipation of litigation. Such documents can only be discovered after an appropriate showing. The rule also provides for further protection of mental impressions, thus recognizing a distinction between ordinary and opinion work product. *See Sporck v. Peil*, 759 F.2d 312 (3rd Cir. 1985). The policy underlying the work product doctrine is the realization that it is necessary to protect the document prepared by the attorney (or others) in anticipation of litigation, thereby creating the necessary environment to encourage proper preparation of a case thus enabling the adversary system to function properly. But a further policy of this rule is to protect the attorney's mental impressions and opinions: "At its core, the work product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case. But the doctrine is an intensely

practical one, grounded in the realities of litigation in our adversary system." *United States v. Nobles*, 422 U.S. 225, 238 (1975).

The theory underlying our adversary system of justice is that through the clashing of two well prepared and knowledgeable attorneys, the truth emerges in litigation, thus there is a need for both sides to equally prepare on their own and neither to have an unfair advantage. The avoidance of an unfair advantage is the policy behind the liberal discovery rules - both parties should have equal access to facts, regardless of which party is in possession of such facts. Likewise, the avoidance of any unfair advantage also underlies the work product doctrine - neither party should be able to invade the privacy of the opposing attorney's preparation of his case. Although at times it may be necessary to allow one party to obtain discovery of the work product of the other party in order to allow the party to ascertain facts, when the objects of discovery consist of opinions, mental impressions, or evaluations of the case of the opposing counsel, 26(b)(3) gives special protection to such documents.

The Supreme Court analyzed the situation in *Hickman* as:

> An attempt without purported necessity and justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties. As such, it falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims. Not even the most liberal of the discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.

329 U.S. at 510.

That "public policy underlying the orderly prosecution and defense of legal claims" requires protection of the attorney's work product, because in serving his client:

> It is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their client's interest.

329 U.S. at 511.

In *Hickman* the court noted that the work product of the attorney is reflected in a variety of ways, both tangible and intangible, and is not limited to mere memoranda and briefs. 329 U.S. at 511. The court indeed gave great protection to such work product:

> Were such material opened to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts heretofore inviolate, would not be his own. Inefficiency, unfairness, and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

329 U.S. at 511.

The policy behind *Hickman* is based upon the belief that the adversary system is at its best when both attorneys prepare their own case. The court did recognize an area where discovery of work product may be had: "where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had." 329 U.S. at 511. But notice the emphasis here is on the facts, and there does not appear to be any relevant facts involved in the risk management documents of Searle, but these are merely assessments of the risk of litigation of the case and estimated settlement and verdict values. Allowing one party access to such documents containing the opposing attorney's evaluation of the risks of litigation in a case violates the policy of *Hickman*.

Because the "general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure," the burden rests on the party seeking to invade the privacy to show adequate reasons for doing so. *Hickman*, 329 U.S. at 512. Rule 26(b)(3) preserves this notion, requiring a "showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Rule 26(b)(3) goes on to provide for special protection from mental impressions of the attorney, stating that "the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Recognize how this provision provides not only for protection of the attorney's legal theories and opinions, but also for the protection of those opinions by other representatives of the party, such as those who are in the risk management department at Searle who provided input into these documents. Rule 26(b)(3) recognizes that it is essential

to the adversary process that an attorney's mental impressions be protected. Remember also that the allowance of discovery under the work product rule is for the discovery of facts, and should never be considered as allowing the discovery of an attorney's mental impressions or opinions, because the rule states that when allowing discovery after a necessary showing, "the court shall protect against disclosure of" such mental impressions.

In *Sporck v. Peil*, 759 F.2d 312 (3rd Cir. 1985) the court found that the work product doctrine protected the selection process of documents by an attorney, since that process revealed the attorney's mental impressions and legal opinions. The Third Circuit recognized that: "preserving the privacy of preparation that is essential to the attorney's adversary role is the central justification for the work product doctrine." 759 F.2d at 316 (citing *Hickman*). The court went on to state:

> Opinion work product includes such items as an attorney's legal strategy, his intended lines of proof, his evaluation of the strengths and weaknesses of his case and the inferences he draws from interviews with witnesses. [citations]. Such material is accorded almost absolute protection from discovery because any slight factual content that such items may have is generally outweighed by the adversary system's interest in maintaining the privacy of an attorney's thought processes and in insuring that each side relies on its own wit in preparing their respective cases [citations].

759 F.2d at 316. It appears that the plaintiff in Searle is not seeking any facts through his discovery of the documents but is merely seeking the risk evaluations of the attorneys in order to enhance his position for settlement.

The documents at issue reveal the attorney's "evaluation of the strengths and weaknesses of his case". Furthermore there is no "factual content in such items" that is useful to the preparation of the plaintiff's case which would insure a fair trial. The only use of this information will be to the plaintiff's counsel for his use in settlement negotiations. That is the only relevance of such reserves, they have nothing to do with liability or damages, which are the issues in the case.

The policy of the work product rule and the policy behind discovery must be applied together. The policy behind discovery is to give both parties access to facts, while the policy behind the protection of work product is to encourage preparation of a case, and the further protection of opinion work product is to protect the mental impressions of an attorney and thereby encourage similar preparation. These policies do not conflict. Such policies are compatible and both are necessary for justice, because, while the discovery of facts assist the parties in their preparation of a case, the protection of work product encourages both parties to, in fact, develop their own case.

Another case dealing with the work product doctrine is *Shelton v. American Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986). In that case the court stated:

> The issue on appeal is whether a deponent's mere acknowledgement of the existence of corporate documents is protected by the work-product doctrine or the attorney-client privilege. We hold that where, as here, the deponent is opposing counsel and has engaged in a selective process of compiling documents from among voluminous files in preparation for litigation, the mere acknowledgement of the existence of those documents reveal

> counsel's mental impressions, which are protected as work product.

805 F.2d at 1326. The court stated that in *Hickman* "the Supreme Court acknowledged the well recognized policy against invading the privacy of an attorney's course of preparation. The court held that a party may invade the privacy in search of relevant and non-privileged facts only upon a showing of adequate justification." 805 F.2d at 1328. The emphasis is on relevant and non-privileged *facts* and not upon obtaining the *legal opinion* of the attorney and how he assesses the risk in litigating a case. The court concluded that the attorney's "selective review of AMC's numerous documents was based upon her professional judgment of the issues and defenses involved in this case. This mental selective process reflects Burns' legal theories, and thought processes, which are protected as work product." 805 F.2d at 1329. Certainly the documents sought by the plaintiff in the Searle case reflect legal theories and thought processes of the Searle attorneys and the Risk Management Department in that the documents consist of opinions addressing the likely outcome of the cases in litigation and the settlement values of such cases. If the selection of documents by an attorney is viewed as the type of mental process protected as work product, an attorney's assessment of the risk in litigating a case and the probable settlement value of such cases is also protected, for that goes to the core of the attorney's role in evaluating and advising a client in preparation of litigation.

C. THE DOCUMENTS FALL WITHIN THE SCOPE OF ATTORNEY-CLIENT COMMUNICATIONS.

The Risk Management documents and aggregate reserves are also protected by the attorney-client privilege. This privilege, like the work product doctrine, is to encourage proper preparation of cases and allow the client to be fully apprised of his legal rights and duties. This court has stated:

> Its purpose is to encourage full and frank communication between attorneys and their clients, and thereby promote broader public interest in the observance of law and administration of justice. The privilege recognizes that sound legal advice serves the public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client.

Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). It has been stated that this privilege is based "on the theory that encouraging clients to make the fullest disclosure to their attorneys enables the latter to act more effectively, justly and expeditiously, and that these benefits outweigh the risks posed by barring full revelation in court." Weinstein's Evidence, ¶ 503[02] at 503-15. In *Matter of Fischel*, 557 F.2d 209 (9th Cir. 1977), the court concluded:

> The rationale for the rule is to encourage clients to confide fully in their attorneys without fear of future disclosure of such confidences. This in turn will enable attorneys to render more complete and competent legal advice. . . . The purpose of the privilege is to protect and foster the client's freedom of expression.

Id. at 221. Concerning the scope of the privilege the court stated:

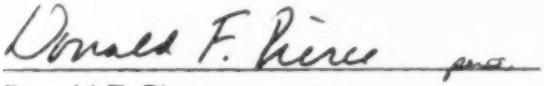
> Of necessity the privilege is not limited to the actual communication by the client to the attorney. Ordinarily the compelled disclosure of an attorney's communications or advice

> to the client will effectively reveal the substance of the client's confidential communication to the attorney. To prevent this result, the privilege normally extends both to the substance of the client's communication as well as the attorney's advice in response thereto. *See United States v. United Shoe Machinery Corp., supra.* It also extends to those papers prepared by an attorney or at an attorney's request for the purpose of advising a client, provided the papers are based on and would tend to reveal the client's confidential communications.

Id. at 221. The Risk Management documents do not magically lose their confidentiality simply because information is pooled to determine aggregate numbers. The documents retain their privileged status.

CONCLUSION

For the reasons advanced above, the decision of the Eighth Circuit should be reversed.



Donald F. Pierce
President, Defense Research Institute
and Trial Lawyers Association

c/o P. O. Box 123
Mobile, Alabama 36601

Petitioner for
G. D. Searle & Co.

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 25th day of September, 1987, served a copy of the foregoing pleading on counsel for all parties to this proceeding by mailing the same by United States Mail, properly addressed and first class postage pre-paid.

Davis Carr

Davis Carr

Counsel of Record:

Laura A. Kaster
Jenner & Block
One IBM Plaza
Chicago, Illinois 60611

Robert P. Brosnahan
Robins, Zelle, Larson & Kaplan
1800 International Centre
900 Second Avenue South
Minneapolis, Minnesota 55402

MOTION FILED
SEP 25 1987

No. 87-326

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

G. D. SEARLE & CO.,

Petitioner,

v.

DEBRA A. and GEORGE SIMON, *et al.*,

Respondents.

Petition For A Writ of Certiorari To The United States Court of Appeals For The Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE PHARMACEUTICAL MANUFACTURERS ASSOCIATION

ROBERT F. ALLNUTT
PHARMACEUTICAL MANUFACTURERS ASSOCIATION
1100 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 835-3400

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-326

G. D. SEARLE & CO.,

Petitioner,

v.

DEBRA A. and GEORGE SIMON, *et al.*,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE PHARMACEUTICAL MANUFACTURERS ASSOCIATION

The Pharmaceutical Manufacturers Association (PMA) respectfully moves this Court for leave to file the attached brief *amicus curiae* in support of G.D. Searle's petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit. The consent of counsel for the petitioner has been obtained. The consent of the attorney for the respondents was requested but refused.

The Pharmaceutical Manufacturers Association is a voluntary national association of more than one

hundred research-based companies that discover, develop and produce most of the prescription drugs used in the United States.

The decision of the Eighth Circuit Court of Appeals permits discovery of aggregate reserve fund estimates established by companies defending multiple plaintiff product liability lawsuits. Many PMA member companies rely on such aggregate reserve fund estimates in creating their defense and settlement strategy. If the Eighth Circuit's decision is allowed to stand, PMA member companies will, to their detriment, be forced to reveal such estimates and significantly alter internal company procedures with respect to the defense and settlement of product liability litigation.

The PMA *amicus curiae* brief sets forth facts, not expressly set forth in petitioner's brief, that outline the increasing exposure of PMA member companies to product liability lawsuits. PMA's *amicus* brief does not repeat or expand on the legal arguments presented by the petitioner.

Respectfully submitted,

ROBERT F. ALLNUTT
PHARMACEUTICAL MANUFACTURERS ASSOCIATION
1100 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 835-3400

Attorney for *Amicus Curiae*
Pharmaceutical Manufacturers Association

Dated: September 25, 1987

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-326

G. D. SEARLE & CO.,

Petitioner,

v.

DEBRA A. and GEORGE SIMON, *et al.*,

Respondents.

Petition For A Writ Of Certiorari
To Th United States Court of Appeals
For The Eighth Circuit

BRIEF AMICUS CURIAE OF THE PHARMACEUTICAL MANUFACTURERS ASSOCIATION

The Pharmaceutical Manufacturers Association (PMA) is a voluntary national association of more than one hundred research-based companies that discover, develop and produce most of the prescription drugs used in the United States. Petitioner, G.D. Searle & Co., is an active PMA member.

This country in recent years has experienced a significant increase in the number of product liability cases brought each year. The pharmaceutical manufacturing industry has not been immune to the effects of this increase. Prescription drug manufacturers are

frequently sued for adverse side effects allegedly caused by the prescription drug, and increasingly are subjected to numerous legal claims with respect to the same product. These claims occur despite the fact that the labeling for the prescription drug fully warns of known adverse effects and the drug itself may be dispensed to patients only upon the prescription of a licensed practitioner.

PMA member companies are thus regularly defendants in product liability lawsuits. In addition many PMA members are self-insurers since private insurance to cover the company's exposure in such litigation is not currently available.

PMA member companies establish aggregate reserve funds based upon estimates of the costs of defending and settling individual product liability lawsuits. Company reliance on aggregate funds estimates is a prudent internal approach and an accepted accounting procedure in product liability litigation where there are multiple claims with respect to the same product, not only in instances when the company is a self-insurer but also when a private insurance carrier is involved.

The PMA has reviewed G.D. Searle & Co's petition which adequately presents the reasons why the Court should review the Eighth Circuit's decision. The legal issue of discovery of aggregate fund estimates is of

widespread importance to the research-based pharmaceutical industry. PMA urges the Court to grant the petition.

Respectfully submitted,

ROBERT F. ALLNUTT
PHARMACEUTICAL MANUFACTURERS ASSOCIATION
1100 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 835-3400

Attorney for *Amicus Curiae*
Pharmaceutical Manufacturers Association

Dated: September 25, 1987

ION FILED
SEP 25 1987

No. 87-326

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

G.D. SEARLE & CO.,
Petitioner,
v.
DEBRA A. AND GEORGE SIMON, *et al.*,
Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals For the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITIONER

HERBERT L. FENSTER
Counsel of Record
STANLEY W. LANDFAIR
DOROTHY E. TERRELL
MCKENNA, CONNER & CUNEO
1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 789-7500
Attorneys for the Amicus Curiae

Of Counsel:
ROBIN S. CONRAD, ESQ.
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-326

G.D. SEARLE & CO.,

Petitioner,

v.

DEBRA A. AND GEORGE SIMON, *et al.*,

Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals For the Eighth Circuit

---

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITIONER

The Chamber of Commerce of the United States hereby moves for leave to file the attached brief *amicus curiae* in support of the petition for certiorari in this case pursuant to Supreme Court Rule 36.1. This motion is necessary because counsel for the respondents refused to consent to the filing of the brief. Counsel for the petitioner, G.D. Searle & Co., has consented to the filing.[1]

---

[1] A copy of the petitioner's consent letter is being filed simultaneously with the attached brief.

This case arose out of a series of product liability actions related to a contraceptive device manufactured by the petitioner, G.D. Searle & Co. ("Searle"). The issues presented involve the discoverability of documents reflecting counsel's confidential estimate of the settlement value of claims pending against a corporate defendant and the amount of cash reserves required to satisfy such claims. The Eighth Circuit's holding that such documents are not protected from discovery under the work product doctrine or the attorney-client privilege will adversely affect the ability of corporate defendants effectively to defend and settle such cases in the future.

The Chamber of Commerce of the United States ("Chamber") is the nation's largest federation of businesses, representing more than 180,000 companies as well as several thousand trade and professional associations and state and local chambers of commerce. The Chamber regularly presents its views before this Court and the lower federal courts.[2] The Chamber's membership includes many businesses which, due to the nature of the products they manufacture, are occasionally the object of mass product liability litigation. The Chamber has surveyed many of these members—including members of the chemical, pharmaceutical and materials industries—and determined that the procedures followed by Searle to assess its potential liability and accrue a reserve of funds to satisfy pending claims are similar to those used in most of the major industries in the United States. The Court's ruling in this case thus will have a substantial effect on American business.

---

[2] *See, e.g., Boyle v. United Technologies Corp.*, 792 F.2d 413 (4th Cir. 1986), *cert. granted*, 107 S. Ct. 872 (1987); *Tull v. United States*, 107 S. Ct. 1831 (1987); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985); *Bowen v. United States Postal Service*, 459 U.S. 212 (1983); *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

If the ruling of the Eighth Circuit is not reversed, it will seriously diminish the ability of a corporation to obtain the advice of legal counsel to assess potential liabilities when faced with such claims, and to set aside funds to satisfy and defend such claims. In so doing, it will frustrate the ability of corporations to comply with accounting and accrual practices that benefit not only the corporation and its stockholders, but the general public as well as plaintiffs who bring such claims. Moreover, the disclosure of this information in mass tort litigation will inhibit the settlement of such cases and improperly encourage the filing of unmeritorious and frivolous claims.

As the principal voice of the American business community, the Chamber is well-suited to represent its interests in this case. Because the Chamber believes it is important for this Court to recognize the significance of this issue to the business community in general, the Chamber respectfully requests leave to file the attached brief.

Respectfully submitted,

HERBERT L. FENSTER
Counsel of Record
STANLEY W. LANDFAIR
DOROTHY E. TERRELL
MCKENNA, CONNER & CUNEO
1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 789-7500
Attorneys for the Amicus Curiae

Of Counsel:
ROBIN S. CONRAD, ESQ.
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

September 25, 1987

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST	1
STATEMENT OF THE CASE	1
REASONS FOR GRANTING THE WRIT	3
I. THE EIGHTH CIRCUIT'S UNPRECEDENTED RULING WILL HAVE A SWEEPING EFFECT ON BROAD SEGMENTS OF AMERICAN BUSINESS	3
A. The Claim Evaluation Procedures Followed By Searle Are Typical of Those Used In the Major Industries Subject to Mass Product Liability Litigation and Require the Advice of An Attorney	3
B. The Practice of Establishing Case Reserves Is Beneficial to the Public Interest	5
C. Disclosure of Aggregate Case Reserves Will Frustrate A Corporate Defendant's Ability to Obtain Legal Advice	6
D. Disclosure of Aggregate Case Reserves Will Discourage Settlements In Mass Product Liability Matters	7
E. Disclosure of Aggregate Case Reserves Will Encourage Litigious Plaintiffs to File Frivolous Claims	8
II. CONCLUSION	9

TABLE OF AUTHORITIES

CASES Page

Hickman v. Taylor, 329 U.S. 495 (1947) 7
Simon v. G.D. Searle & Co., 816 F.2d 397 (8th Cir. 1987) 2, 3, 8

STATUTES AND REGULATIONS

28 U.S.C. § 1292(b) (1982 & Supp. III 1985) 3
17 C.F.R. pt. 210 (1987) 6

OTHER AUTHORITIES

Rubin, *Mass Torts and Litigation Disasters*, 20 Ga. L. Rev. 429 (1986) 4
FASB Statement of Financial Accounting Standards No. 5 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-326

G.D. SEARLE & CO.,

Petitioner,

v.

DEBRA A. AND GEORGE SIMON, *et al.*,

Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals For the Eighth Circuit

---

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITIONER

STATEMENT OF INTEREST

The Chamber of Commerce of the United States ("Chamber") respectfully refers this Court to the attached Motion for Leave to File Brief Amicus Curiae for a statement of the Chamber's interest in this proceeding.

STATEMENT OF THE CASE

This case arises out of a series of product liability actions related to a contraceptive device manufactured by petitioner, G.D. Searle & Co. ("Searle"). Forty-nine of these cases were consolidated for discovery in the United States District Court for the District of Minnesota before the Honorable Miles W. Lord. In response to the

court's sweeping order to produce "each and every document contained in its files" relating to the device, Searle produced over 500,000 documents. *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 399 (8th Cir. 1987). The company resisted discovery, however, of certain documents prepared by Searle's risk management department "to keep track of, control, and anticipate the costs of Searle's product liability litigation." *Id.* at 400. Many of these documents included product liability litigation reserve information that was based on reserve estimates prepared by and obtained directly from the attorneys in Searle's legal department.

Whenever Searle is notified of a claim or lawsuit against it, the company requests one of its attorneys to analyze the matter and advise the company of an appropriate amount to set in reserve. The attorney sets the reserve on the basis of numerous factors, including his estimate of the company's liability (if any), anticipated legal expenses required to defend the matter, and the length of time required to resolve the action. The attorney then communicates these estimates to the risk management department.

Information regarding case reserves is regarded as confidential information within the company, and is available only to the attorneys and risk management personnel with a specific "need to know" the amount of the reserves. The information is not released outside the company at all, except to outside legal counsel, who need the information to defend the claims and negotiate settlements, and to insurers, who must be prepared to participate in paying these claims.

Following *in camera* review of these documents by a special master, the court permitted Searle to withhold from discovery only those which revealed a " 'specific litigation strategy or mental impressions of attorneys in evaluating cases, or setting a reserve for a specific case' ". *Id.* at 399 (citation omitted). Documents revealing "ag-

gregate reserve information not identified with individual cases" were ordered to be disclosed. *Id.*

Searle was granted permission under 28 U.S.C. § 1292(b) (1982 & Supp. III 1985) to take an immediate appeal from this interlocutory order. In a split decision, the United States Court of Appeals for the Eighth Circuit found that documents revealing aggregate case reserves were not protected from discovery under the work product doctrine or the attorney-client privilege. By a vote of five-to-five, a petition for rehearing *en banc* was denied.

REASONS FOR GRANTING THE WRIT

I. THE EIGHTH CIRCUIT'S UNPRECEDENTED RULING WILL HAVE A SWEEPING EFFECT ON BROAD SEGMENTS OF AMERICAN BUSINESS

The Eighth Circuit's decision allows mass product liability plaintiffs access to documents reflecting counsel's confidential estimates of the total settlement value of pending claims against a corporate defendant and the amount of cash reserves required to satisfy such claims. Because this is the first such ruling in the history of American jurisprudence, it should be examined by the Court. If the ruling is not reversed, it will have a sweeping effect on product liability cases affecting major industries throughout the country. Disclosure of this information will adversely affect the ability of corporate defendants to consult with their attorneys to organize and manage such cases, to defend and settle such cases effectively and, ultimately, to satisfy claims brought against them.

A. The Claim Evaluation Procedures Followed By Searle Are Typical of Those Used In the Major Industries Subject to Mass Product Liability Litigation And Require the Advice of An Attorney

The procedures followed by Searle are not unique. The Chamber has surveyed from among its member com-

panies whose industries are known to be subject to mass product liability litigation. These include manufacturers of chemicals, pharmaceuticals, industrial materials and consumer products.[1] The Chamber has confirmed that most businesses faced with mass product liability claims customarily set in place procedures that are similar, if not identical, to those adopted by Searle.

Notice of a claim or a lawsuit against a company in these industries generally is forwarded by the company to an attorney in the company's legal department. It is the specific responsibility of the attorney to evaluate the claim and to determine the company's potential liability. This task is a uniquely legal one which, though it may at times require input and assistance from scientific, accounting, and clerical personnel, must be performed by an attorney. The attorney's evaluation includes analysis of the legal theories of liability asserted against the company, a similar examination of available defenses, a weighing of the evidence supporting these claims and defenses, an assessment of the skill of the attorneys presenting (and defending) a claim, and a knowledge of the predilections of courts and juries.

Claim evaluations are communicated by the attorney to the company, which must decide whether to pay or defend the claim. Where claims are numerous, and where the decision is to defend them, the organization and administration of a defense effort may be quite complex. Such efforts typically result in the generation of numerous documents. Some of these documents (such as invoices and receipts) may contain no information relating to the substance of a claim or its defense. Others (such

---

[1] *See* Rubin, *Mass Torts and Litigation Disasters*, 20 Ga. L. Rev. 429, 430-431 (1986). (Asbestos litigation: 30,000 suits filed; Dalkon Shield litigation: 13,000 suits filed; Agent Orange litigation: class action suit filed by class estimated to include between 600,000 and 2.4 million members.)

as memoranda containing instructions to legal, administrative, or accounting personnel) may reflect communications to and from, or the mental impressions of the corporation's attorneys. All such documents, whether they relay sensitive information or not, are prepared in anticipation of, and in the course of, defending the claims.

Establishment of a "case reserve" is one administrative aspect of the management of a defense effort. Case reserves may be established directly by the attorneys who evaluate the claims, or by accounting (or as in this case "risk management") personnel who operate on the advice of the company's attorneys. The case reserve is used by the company as a planning tool in paying for the defense, settlement and payment of claims.

Where numerous like claims have been brought against a company, it is not unusual for case reserves to be recorded in the aggregate. Whether recorded individually or in the aggregate, however, the reserve figure reflects the confidential estimate of the company's attorney as to the amount required to defend or satisfy the claim.

B. The Practice of Establishing Case Reserves Is Beneficial to the Public Interest

The practice of establishing case reserves has a number of salutory purposes above and beyond its function in the administration of a product liability defense. Many of these purposes, e.g., sound financial planning, serve the private interests of the corporation and its stockholders. The corporate stability that is encouraged by such planning, however, serves a variety of interests that are decidedly public. It allows industrial corporations to continue to serve as a source of employment and critical manufactured goods even as claims against them are litigated. It also permits a favorable environment for commerce and investment to continue to exist in the

presence of claims of a magnitude that, if not properly planned for, could result in massive bankruptcies and related foreclosures.[2]

Ironically, the most direct beneficiaries of the practice of establishing case reserves may be the plaintiffs who bring mass product liability actions. If corporate defendants did not evaluate claims in this systematic fashion and establish and accrue appropriate case reserves, they could not hope to satisfy such claims. Without the benefit of this practice, successful plaintiffs likely could enjoy only pyrrhic victories. Rather than cash payments, most plaintiffs would receive unenforceable judgments against bankrupt corporations as the only vindication for their injuries.

C. Disclosure of Aggregate Case Reserves Will Frustrate A Corporate Defendant's Ability to Obtain Legal Advice

Disclosure of a corporate defendant's aggregate case reserves in mass product liability litigation will frustrate several public policy objectives traditionally favored under the law. Disclosure will inhibit the communication between a corporate defendant and its counsel that is necessary for a corporation to obtain sound legal advice in evaluating its potential liabilities. If it is to become the rule that case reserves are discoverable, then prudent litigation counsel, with a view toward settlement discussions, will keep a wide distance between the liability evaluations he provides to his client and any case reserves the company subsequently may establish. Corporate defendants, moreover, would be unwise (from a litigation perspective) to allow their case reserves to resemble any figures that purport to represent

---

[2] These public interests are embodied in the accounting principles that require accrual and disclosure of certain loss contingencies relating to pending or threatened litigation, *see, e.g.*, FASB Statement of Financial Accounting Standards No. 5. *See also* 17 C.F.R. pt. 210 (1987).

a studied evaluation of their potential liabilities by their attorneys.

Corporate defendants of course have a business need for reliable legal advice, including evaluations from their attorneys of their potential liabilities in cases brought against them. But the law traditionally has not penalized businesses that rely on such advice by making it disclosable to their opponents in litigation. If Searle is to be so penalized in this case, then similarly situated defendants in the future will find ways to set case reserves without jeopardizing the confidentiality of their attorneys' assessment. *Cf. Hickman v. Taylor*, 329 U.S. 495, 511 (1947). ("Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. . . . Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect in the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.")

Corporate defendants who are deprived of frank and thorough legal assessments of their potential liabilities obviously would be handicapped. The public interests served by responsible establishment of accurate litigation reserves, *see supra* at 5-6, thus would suffer and, in the end, the very ability of plaintiffs to obtain recovery for their injuries will be diminished.

D. Disclosure of Aggregate Case Reserves Will Discourage Settlements In Mass Product Liability Matters

Disclosure of aggregate reserves also will frustrate the settlement process in mass tort litigation. As Judge Gibson noted in his dissent below, settlements in such cases frequently are negotiated on a global basis. The unilateral armament of one party to a settlement negotiation with his adversary's assessment of the potential

aggregate liability is unfair. *Simon v. G.D. Searle & Co.*, 816 F.2d at 408 (Gibson, J., dissenting). Moreover, it unfairly erodes the attorney-client privilege of corporate defendants whose in-house counsel participate in claim analysis and litigation strategizing, while preserving the privilege when the same analyses are undertaken by outside counsel on the plaintiff's behalf.

The harm to the settlement process, however, extends beyond this, because disclosure of aggregate case reserves will frustrate settlements in individual cases as well. At this level, the use of such information is particularly unfair. As the majority observed, it is misleading to attempt to compute averages from the aggregate case reserves, "given the possibility of large variations in case estimates for everything from frivolous suits to those with the most serious injuries." *Id.* at 402. It is naive for that court to pretend, however, that the plaintiffs' bar will not misuse the aggregate reserves for this purpose, distilling them into averages, and mistreating these figures as concessions of liability for negotiating purposes with respect to individual claims. The denomination of such figures as "averages" will become a self-fulfilling prophecy. Attorneys who entice clients to litigate will be hard-pressed to explain to any client why he should settle for less than the "average" case reserve. Moreover, the "averages" assuredly will escalate as they become a "floor" for subsequent negotiations in similar cases.

E. Disclosure of Aggregate Case Reserves Will Encourage Litigious Plaintiffs to File Frivolous Claims

Finally, disclosure of aggregate reserves will further encourage the explosion in mass product liability cases that already has swollen the dockets of the district courts. The Court is well aware of the vast numbers of product liability cases brought each year and the various information-sharing techniques employed by the plaintiffs' bar

in litigating and soliciting such cases. *See supra* at 4, n.1. Forced disclosure of funds accrued by corporations to satisfy product liability claims cannot help but inspire those with marginal and frivolous claims to join in the action and to seek "their" share of the aggregate case reserves that appear to await them like a pot of gold at the end of the rainbow.

II. CONCLUSION

For these reasons stated above, the Court should grant the petition for certiorari.

Respectfully submitted,

HERBERT L. FENSTER
Counsel of Record
STANLEY W. LANDFAIR
DOROTHY E. TERRELL
MCKENNA, CONNER & CUNEO
1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 789-7500
Attorneys for the Amicus Curiae

Of Counsel:
ROBIN S. CONRAD, ESQ.
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

September 25, 1987

MOTION FILED
SEP 28 1987

No. 87-326

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

G.D. SEARLE & CO.,
Petitioner,

v.

DEBRA A. AND GEORGE SIMON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF PETITION FOR CERTIORARI

THOMAS W. BRUNNER *
JEFFREY F. LISS
LAURA A. FOGGAN
PIPER & MARBURY
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 785-8150
Attorneys for Amicus Curiae
American Insurance Association

* Counsel of Record

September 28, 1987

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-326

G.D. SEARLE & CO.,

Petitioner,

v.

DEBRA A. AND GEORGE SIMON, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

MOTION OF THE AMERICAN INSURANCE ASSOCIATION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 36.3, the American Insurance Association ("AIA") hereby moves this Court for leave to file the attached *amicus curiae* brief in support of G.D. Searle & Co.'s ("Searle") request for a writ of certiorari in this case.*

AIA is a trade association comprising approximately 177 property and casualty insurance companies. AIA's

---

* Searle has consented to the filing of an *amicus curiae* brief by the American Insurance Association and the written consent of its counsel has been lodged with the Clerk's office today. Respondents Debra A. and George Simon, et al., have declined to consent to the filing of the proposed *amicus curiae* brief.

member companies provide much of the liability insurance written in the United States. AIA seeks leave to appear as an *amicus curiae* because this case presents issues of substantial importance to the insurance industry and the public that affect the confidentiality of critical insurance carrier and policyholder records.

This case concerns the discoverability of aggregate and average case reserves in mass tort litigation. Although the petitioner in this case, Searle, is not an insurer, it functioned like a self-insurer in setting individual, aggregate and average case reserves. The reserve-setting process is crucial to the health and orderly functioning of the insurance industry. For this reason, AIA is uniquely qualified to explain and present to the Court the ramifications of the ruling below for the setting of reserves, as well as the potential implications of that ruling for the insurance industry. The petition for a writ of certiorari filed by Searle does not address these questions directly, nor are they likely to be addressed adequately by the respondents.

Accordingly, AIA respectfully requests that this Court grant its motion for leave to file the attached *amicus curiae* brief in support of the petition for a writ of certiorari.

Respectfully submitted,

THOMAS W. BRUNNER *
JEFFREY F. LISS
LAURA A. FOGGAN

PIPER & MARBURY
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 785-8150

Attorneys for Amicus Curiae
American Insurance Association

* Counsel of Record

September 28, 1987

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. The Reserves Process	4
II. The Impact of Reserve Disclosure	6
III. The Court's Supervisory Role	12
CONCLUSION	14

TABLE OF AUTHORITIES

Cases Page

A.H. Robins Co. v. Piccinin, 788 F.2d 994 (4th Cir.), *cert. denied*, 107 S. Ct. 251 (1986) 10
Carver v. Allstate Insurance Co., 94 F.R.D. 131 (S.D. Ga. 1982) 11
Cipollone v. Liggett Group, 822 F.2d 335 (3d Cir. 1987) 7
FTC v. Grolier, Inc., 462 U.S. 19 (1983) 10
Hickman v. Taylor, 329 U.S. 495 (1947) 8, 12
Independent Petrochemical Corp. v. Aetna Casualty & Surety Co., No. 83-3347 (D.D.C. Mar. 9, 1987) 13
Maryland Casualty Co. v. United States, 251 U.S. 342 (1920) 4
Maryland Casualty Co. v. W.R. Grace & Co., 83 Civ. 7451 (SWK) (S.D.N.Y. June 15, 1987) (bench ruling) 13
Stine v. Continental Casualty Co., 419 Mich. 89, 349 N.W.2d 127 (1984) 5
Union Carbide Corp. v. Travelers Indemnity Co., 61 F.R.D. 411 (W.D. Pa. 1973) 11, 13
Upjohn Co. v. United States, 449 U.S. 383 (1981) 12
Ward v. Ford Motor Co., 93 F.R.D. 579 (D. Colo. 1982) 7

Miscellaneous

2A G. Couch, *Couch on Insurance 2d* § 21:35 (2d ed. 1984) 5
Federal Rule of Evidence 408 9
Federal Rules of Civil Procedure
Rule 26(b)(1) 8
Rule 26(b)(3) 6
Cook, *Trial Lawyers to Focus on Tort Reform*, The National Law Journal, July 21, 1986 7
Galante, *Zomax Document Release Disputed*, The National Law Journal, April 22, 1985 7
Galante, *Discovery: Walking in the Valley of Stealth; Unusual Paths Are Cheap, Fast*, The National Law Journal, Feb. 11, 1985 7
S. Huebner, *et al.*, *Property and Liability Insurance* (3d ed. 1982) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-326

G.D. SEARLE & CO.,

Petitioner,

v.

DEBRA A. AND GEORGE SIMON, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF *AMICUS CURIAE* AMERICAN INSURANCE ASSOCIATION IN SUPPORT OF PETITION FOR CERTIORARI

INTEREST OF *AMICUS CURIAE*

The American Insurance Association ("AIA") is a trade association of approximately 177 property and casualty insurance companies. AIA's interest in this case, which is set forth in detail in its motion for leave to file preceding this *amicus curiae* brief, stems from the substantial importance to the insurance industry and the public of the Eighth Circuit's ruling concerning the discoverability of aggregate and average case reserves in mass tort litigation. AIA is uniquely qualified to address that ruling's implications for the confidentiality of crucial insurance carrier and policyholder records.

SUMMARY OF ARGUMENT

This case presents a recurring, important policy issue affecting discovery in tens of thousands of cases: are the ordinary protections of the work product doctrine and the attorney-client privilege lost to a corporate litigant when it must defend so many tort claims that those claims significantly affect its business? In this case, the lower courts answered this question affimatively.

Following a practice widespread among corporations facing mass tort claims (and one similar to insurance industry practice), Searle set individual, aggregate and average case reserves for its anticipated litigation exposure and occasionally adjusted those reserves. The courts below acknowledged that both the attorney-client privilege and work product immunity barred disclosure of the individual case reserves and their supporting documentation. They held discoverable, however, aggregate and average reserve data for all such claims that Searle faces. Nothing in the opinions below suggests that disclosure of that information serves any legitimate need of the tort plaintiffs.

Instead, the Eighth Circuit predicated its ruling solely on two unsound premises. First, over vigorous dissent and without detailed analysis, it assumed that aggregate and average reserves disclose nothing of value to opposing counsel. As AIA reviews below, that assumption is incorrect.

Second, the Eighth Circuit held that, when the volume and importance of tort litigation make it a meaningful business concern, a corporation forfeits the traditional protections afforded other litigants, at least as to major parts of its litigation work product such as reserve data. This doctrine would confound the basic premise of litigation work product confidentiality in a setting in which it is particularly important. Documents reflecting *bona fide* litigation preparation should not be discoverable

merely because the litigation has major financial implications.

Unless overturned by this Court, the 2-1 holding of the Eighth Circuit will create uncertainty throughout the United States. Not only manufacturing companies like Searle will be affected. The open-ended notion that, when business "involves litigation" (App. 8), traditional litigation protections are stripped away potentially could apply to the work of insurers who, as part of their business, manage litigation for their policyholders and who must by law reflect their litigation judgments in reserves. Particularly since lower courts have divided on the discoverability of reserve information, that question, potentially presented in most of the burgeoning number of mass tort and other products liability cases in the federal courts, requires the Court's determination.

ARGUMENT

This case concerns the extent to which a corporate defendant may be compelled to "tip its hand" to mass tort plaintiffs regarding its "reserves," the projections it has made concerning its exposure. Although this case directly involves reserve setting by a product manufacturer, it has significant implications for the reserve process in the insurance industry as well.[1] AIA reviews in turn the contours of the insurance industry's reserves process which may well be affected by this case, the implications of compelled disclosure of reserve information, and the pitfalls of the lower courts' analysis of the work product and attorney-client protections. AIA

[1] As explained by the court below, Searle maintains a risk management department to monitor its products liability litigation and analyze its litigation reserves. (App. 2.) Searle's risk management department is also responsible for the company's insurance coverage. Because Searle's product liability insurance has a high deductible component, the company acts like a self-insurer to a significant degree, and its activities in dealing with reserves are somewhat analogous to those of an insurer. (App. 2-3.)

closes by suggesting that the Court should resolve the conflict in the lower courts regarding this recurring issue of importance to a large and rapidly expanding category of federal litigation.

I. The Reserves Process

The setting of reserves is critical to the insurance industry, policyholders, and the public in general. This Court long ago recognized the "special meaning in the law of insurance" attributed to the term "reserves":

> [I]n general it means a sum of money, variously computed or estimated, which, with accretions from interest, is set aside—"reserved"—as a fund with which to mature or liquidate, either by payment or by reinsurance with other companies, future unaccrued contingent claims, and claims accrued, but contingent and indefinite as to amount or time of payment.

Maryland Casualty Co. v. United States, 251 U.S. 342, 350 (1920). Reserves thus represent a "set-aside" fund for contingent and highly uncertain liabilities. Indeed, an insurance carrier sets reserves for unknown claims that have been incurred but not reported because it knows actuarially that such claims will be asserted. Applied in the context of tort claims lodged against a policyholder, an insurer's reserves are predictions of the litigated or negotiated results of those claims only in the most general sense. They are sometimes fixed by formula or in bulk and often are based on preliminary, available information. In reality, reserves are set aside to make certain that the insurer will be in a position to satisfy all of its currently hypothetical and uncertain obligations, as they actually mature into payable obligations.[2]

---

[2] *See generally* S. Huebner, *et al.*, *Property and Liability Insurance* 607-13 (3d ed. 1982) (discussion of insurers' reserve-setting process).

Nonetheless, in the mass tort context particularly, reserves necessarily begin with an assessment of the merits of the tort claims, and adjustments in reserves often respond to changes in that assessment. The setting of case reserves is an inexact science[3] in which claims personnel—who often are, or work in conjunction with, attorneys—use available information to make judgments about potential liability and the potential magnitude of any award or settlement. These judgments obviously entail reflection on the strengths and weaknesses of each side's case in ongoing or anticipated litigation. The fact that such assessments are sensitive and confidential is apparent from their nature.

The public interest in achieving the greatest possible accuracy and honesty in the setting of reserves is also obvious. With a publicly-held manufacturer involved in large-scale litigation, financial information available to management and investors may be seriously distorted if adequate reserves are not posted. If insurance companies fail to set aside sufficient reserves, not only the companies but their policyholders and unrelated claimants against their policies also will suffer. The process is so important that numerous states require and regulate insurers' setting of reserves. *See* 2A G. Couch, *Couch on Insurance 2d* § 21:35 (2d ed. 1984).

---

[3] For example, one court has noted that:

> When the "event" intended to be covered cannot easily be fixed and the liability for consequent injury extends long into the future, often well after expiration of the policy, considerations of inflation, upward spiraling jury awards, and legislative and judicial adoption of newly developing concepts of tort law mean that actuarial factors, including fixing premium rates and establishing adequate reserves, are highly speculative.

Stine v. Continental Cas. Co., 419 Mich. 89, 349 N.W.2d 127, 131 (1984).

II. The Impact of Reserve Disclosure

The court below properly found individual case reserves to be fully protected from discovery. It recognized that those reserves "embody the attorney's estimate of anticipated legal expenses, settlement value, length of time to resolve the litigation, geographic considerations and other factors." (App. 6.) The court below concluded, however, that aggregate and average reserves "dilute" the protected individual case reserve information they necessarily comprise to such an extent as to extinguish applicable work product and attorney-client protections.[4] Without detailed analysis, the court reasoned that, when aggregate or average reserves are disclosed, no "mental impressions, thoughts and conclusions of an attorney" are revealed.

This assumption is unsound in many instances, most obviously, because it ignores the realities of modern mass tort litigation. In recent years, sophisticated steering committees of plaintiffs' counsel[5] with substantial re-

---

[4] The suggestion that, because protected information is "diluted," the attorney-client privilege is rendered inapplicable has no foundation. The attorney-client privilege is not a qualified protection which can be overcome by a showing that the need for protection is somehow diminished. Nor is this the test for overcoming work product immunity. To the contrary, work product materials are discoverable "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Fed. R. Civ. P. 26(b)(3). Even after that required showing has been made, "the Court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation." *Id.* In this case, there has been no suggestion of any need or undue hardship to the plaintiff to support discovery of aggregate or average reserve information.

[5] The United States Court of Appeals for the Third Circuit, in a ruling that affects as many as 125 cases pending against tobacco companies nationwide, recently upheld rulings permitting plaintiffs' attorneys to share with lawyers in similar cases documents

sources have been created to share and sift carefully all available evidence. Advanced computer technology is used to compile and analyze information. Sharing of discovery information in mass tort cases is also promoted by court procedural mechanisms such as multi-district litigation, class actions, and the consolidation of cases.

Indeed, this case directly involves forty-nine of the Cu-7 product liability cases, which were consolidated for discovery in the United States District Court for the District of Minnesota. (App. 2.) Moreover, plaintiffs' counsel in the Cu-7 cases against Searle have established a clearinghouse for discovery information and actively coordinate their efforts through the Cu-7 Litigation Steering Committee of the American Trial Lawyers Association. (Petition at 4.) The organized discovery efforts that are widespread in modern mass tort litigation underscore the extent to which aggregate and average reserves are likely to reveal protected thought processes.[6]

---

obtained in discovery. *Cipollone v. Liggett Group*, 822 F.2d 335 (3d Cir. 1987). A United States District Court in Colorado approved similar discovery information-sharing among plaintiffs' attorneys in fuel system integrity cases against automobile manufacturers in *Ward v. Ford Motor Co.*, 93 F.R.D. 579 (D. Colo. 1982). The formation of information clearinghouses and steering committees of plaintiffs' counsel in mass tort litigation is increasingly common. *See, e.g.*, Galante, *Zomax Document Release Disputed*, The National Law Journal, April 22, 1985, at 10 (plaintiffs' lawyers sharing discovery in hundreds of lawsuits over Zomax, a painkiller recalled by McNeilab, Inc.); Cook, *Trial Lawyers to Focus on Tort Reform*, The National Law Journal, July 21, 1986, at 3 (members of plaintiffs' executive committee in the Bhopal litigation discuss coordination, planning and discovery at ATLA meeting); Galante, *Discovery: Walking in the Valley of Stealth, Unusual Paths Are Cheap, Fast*, The National Law Journal, Feb. 11, 1985, at 1 (references to Blatt & Fales' coordination of discovery for asbestos plaintiffs in 39 states and to proliferation of computer databases offering valuable information).

[6] Judge Gibson of the Eighth Circuit, who was a prominent Kansas City trial attorney before his appointment to the bench, noted this concern in his dissent. (App. 21-22.)

Attorneys' thought processes may also be revealed by aggregate and average reserves in other, more direct ways. For example, as noted in its Petition at 3, Searle has prevailed in most of its Cu-7 IUD litigation. If nonetheless it has set large aggregate reserves, disclosure of that fact would enable opposing counsel to ascertain that Searle fears large losses. That fact would affect litigation strategy, settlement negotiation, and the filing of additional claims. Similarly, adjustments in reserve levels after a major litigation development (e.g., a verdict in the initial case, a key legal ruling, or a critical deposition) necessarily would reflect and reveal the judgment of Searle's lawyers regarding the significance of the news.

In general, since mass tort suits, like most personal injury claims, typically seek only the recovery of money damages, estimates of the amounts ultimately payable in such damages, and changes in those estimates as events unfold are fertile fields for the kinds of inappropriate inquiry this Court first proscribed in *Hickman v. Taylor*, 329 U.S. 495 (1947). As a result, AIA believes that the lower courts failed to appreciate the sensitivity of aggregate and average reserves. The ruling below, compelling the disgorgement of aggregate and average reserve information compiled by a self-insurer, would, if extended to the insurance industry, undercut the entire reserves process.

In ordering disclosure of aggregate and average reserve information, the courts below truncated the proper stages of analysis. Initially, there is no suggestion in any of the opinions below that the information sought is "relevant" to the plaintiffs' case within the meaning of Rule 26(b)(1) of the Federal Rules of Civil Procedure. That information is not admissible evidence nor is it "reasonably calculated to lead to the discovery of admissible evi-

dence."[7] The disclosure would serve no legitimate need of the tort plaintiff. Certainly, none is suggested by the lower courts.

Rather than initially addressing the relevance of the information sought, the courts below proceeded directly to fashion a novel and dubious exception to both the work product doctrine and the attorney-client privilege. The Eighth Circuit enunciates the new concept that the work product protection falls away when a company's business "involves litigation" at least where the otherwise protected information reflects litigation judgments only in "an indirect and diluted manner." (App. 8-9.) It predicates its conclusion on various cases and commentaries that distinguish documents prepared in the "ordinary course of business" from those arising in the conduct of litigation. None of those authorities supports the notion that large-scale litigation *becomes* unprotected "business" whenever that litigation is important enough to have business implications.

Searle clearly prepared the reserve information with litigation in mind. Indeed, the documents are *about* litigation. Similarly, there appears to be little dispute that attorneys were involved significantly in the reserves process and that "[t]he risk management documents reflected attorney-client communications running in two directions." (App. 10.) Yet the court below overrode the applicable work product and attorney-client protections, largely on the basis of its finding that "Searle's business involves litigation, just as it involves accounting, marketing, advertising, sales and many other things." (App. 8.) Accordingly, the court found that materials reflecting aggregate and average case reserves should be deemed to be ordinary business documents.

---

[7] Indeed, to the extent that reserve documents can be said to relate to the possibility of settlement, Rule 408 of the Federal Rules of Evidence precludes their evidentiary use.

This doctrine, if allowed to stand, would constitute the exception that swallows the rule that litigation documents ordinarily are entitled to protection. There is no discernible principle to support a conclusion that if a company happens—for whatever reason—frequently to be engaged in litigation, its otherwise protected documents lose their confidential status.[8]

Ironically, the effect of this novel principle is that the protection afforded to a company's litigation-related deliberations diminishes as the importance of the litigation increases. The company involved in an isolated, idiosyncratic lawsuit can escape the disclosure-forcing determination that it is "in the business of litigation" incidental to its main pursuits. However, the industrial company confronted by mass tort litigation, fighting for its corporate survival in the face of hundreds, thousands or tens of thousands of similar claims,[9] is denuded of the nor-

---

[8] Indeed, in *FTC v. Grolier, Inc.*, 462 U.S. 19, 31 (1983), Justices Brennan and Blackmun stressed in their concurring opinion that:

> Any litigants who face litigation of a commonly recurring type—liability insurers, manufacturers of consumer products or machinery, large-scale employers, securities brokers, regulated industries, civil rights or civil liberties organizations, and so on—have an acute interest in keeping private the manner in which they conduct and settle their recurring legal disputes.

As that concurring opinion also noted, the United States Government is perhaps the most obvious example of a participant in similar, recurring litigation. 462 U.S. at 30-31. Extending the lower court's logic, one must conclude that government enforcement agencies, like the other private concerns identified, are in the "business of litigation" and therefore are not entitled to invoke work product or attorney-client protection for any litigation (*i.e.*, "business") document.

[9] Several large, prominent corporations have been forced into bankruptcy by mass tort claims. *See, e.g., A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 996 (4th Cir.) ("[c]onfronted, if not overwhelmed, with an avalanche of actions . . . seeking damages for injuries allegedly sustained by the use of . . . a Dalkon Shield, . . . A.H. Robins filed its petition under Chapter 11"), *cert. denied*, 107 S. Ct. 251 (1986).

mally routine privileges as to some of its most sensitive litigation-related judgments precisely because of the magnitude of the claims against it. Similarly, the insurer whose business includes managing litigation for its numerous policyholders, and whose commercial success depends on its skill in performing that role, would seemingly be denied rudimentary protection for its litigation-related communications under this approach precisely because its litigation is so important to its operations.

The fact that insurance companies are engaged in the business of litigation has not previously led to a judicial conclusion that their work product and privileged documents thereby lose their confidential status. To the contrary, courts have recognized that, while insurers initially manage claims presented to them as a business matter, the time often comes when "an insurance company's activity shifts" to the anticipation of litigation. At that point, documents prepared by claims personnel in anticipation of litigation are afforded standard work-product protection. *See Carver v. Allstate Ins. Co.*, 94 F.R.D. 131, 134 (S.D. Ga. 1982).

This protection has specifically been recognized in the context of, and applied to, reserve information. For example, *Union Carbide Corp. v. Travelers Indemnity Co.*, 61 F.R.D. 411 (W.D. Pa. 1973), denied discovery of reserve information, both because the information was protected and because it was irrelevant. The court held that the Federal Rules of Civil Procedure:

> do not render discoverable the internal opinions and conclusions [the insurer] has reached in evaluating the reserves in issue. . . . [W]e do not believe that the proper end of discovery—expedition of the litigation either by narrowing the area of controversy or by avoiding unnecessary testimony or by providing a lead to evidence—will be served by allowing discovery of the reserves in question.

61 F.R.D. at 413.

The protection for reserve information is rooted in sound principles of litigation fairness and public policy. First, *Hickman v. Taylor*, 329 U.S. 495 (1947), and its progeny reflect the fundamental unfairness of placing a party in a position in which its confidential assessments of liability and ongoing litigation are in the hands of its adversary who may use them in settlement negotiations, in deciding to bring additional claims, or, even more unfairly, before a fact-finder. Litigants must have the ability to be candid with themselves in order to prepare an adequate defense and consider the possibility of settlement.

The Eighth Circuit's "business involves litigation" approach thus poses a grave threat both to important litigation protections and to the vital reserve-setting process of the insurance industry. The Eighth Circuit's decision requires the grant of certiorari to permit full consideration of these issues by this Court.

III. The Court's Supervisory Role

If the Court grants certiorari, it also could resolve conflicting case law governing the discoverability of reserves and provide the lower courts with guidance in addressing the complex discovery problems surrounding reserve information. Establishing the relevant standards is crucial because, as this Court has recognized, "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981). The relatively few courts that have considered these issues have reached directly conflicting results.

For example, in a recent decision involving insurance coverage in the hazardous waste context, the United States District Court for the District of Columbia denied a motion to compel the production of reserve informa-

tion.[10] *Independent Petrochemical Corp. v. Aetna Casualty & Surety Co.*, No. 83-3347 (D.D.C. Mar. 9, 1987).[11] At the same time, the *Independent Petrochemical* court recognized that the authorities are "scant and . . . evenly split." *Id.*, slip op. at 6. In one case granting access to reserve information, the difficulty encountered by the Magistrate deciding the issue—and the lack of guidance available to him—was obvious from his words on a motion to reconsider the ruling:

> As you know, I had a great deal of difficulty in ultimately resolving this issue. . . . I am not certain I am right now. I don't know if there is a right answer. But certainly there are conflicting views from different courts and that is obvious.

Maryland Casualty Co. v. W.R. Grace & Co., 83 Civ. 7451 (SWK) (S.D.N.Y.) (Tr. of hearing of June 15, 1987).[12]

The issues presented are likely to arise in many mass tort cases and other product liability litigation. These cases constitute a large and rapidly expanding category of the federal court docket.[13] Although the personal injury cases are numerous, the opportunity this case presents to the Court is an unusual one. Indeed, this is the

---

[10] Similarly, *Union Carbide Corp. v. Travelers Indemnity Co.*, 61 F.R.D. 411 (W.D. Pa. 1973), provided unequivocal protection for reserve information.

[11] A copy of this unpublished opinion has been lodged with the Clerk of the Court.

[12] A copy of this transcript excerpt has been lodged with the Clerk of the Court.

[13] The Administrative Office for United States Courts reports that in the five years ending June 30, 1987, 56,814 product liability personal injury cases, many of which were mass tort cases, were filed in the federal courts. The number of new filings jumped from 8,026 in 1982-83 to 14,145 in 1986-87. Asbestos cases, which were not even separately tracked in 1982-83, increased from 2,788 in 1983-84 to 7,774 in the last year.

first case to our knowledge where the discoverability of reserve information has been addressed by any appellate court. These matters typically arise in discovery disputes, and normally are resolved prior to trial in the district courts, often by magistrates or special masters. It is the rare case that will proceed through appeal with the reserves issue intact and preserved. Accordingly, AIA urges the Court to take this available occasion to establish the protections available to reserve information.

CONCLUSION

For the foregoing reasons, *amicus curiae* the American Insurance Association urges the Court to grant the requested writ of certiorari.

Respectfully submitted,

THOMAS W. BRUNNER *
JEFFREY F. LISS
LAURA A. FOGGAN

PIPER & MARBURY
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 785-8150

Attorneys for Amicus Curiae
American Insurance Association

* Counsel of Record

September 28, 1987

MOTION FILED
SEP 25 1987

No. 87-326

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

G.D. SEARLE & CO., PETITIONERS

V.

DEBRA A. AND GEORGE SIMON, RESPONDENTS

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF FOR THE AMERICAN CORPORATE COUNSEL ASSOCIATION AS *AMICUS CURIAE* AND BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

CARL D. LIGGIO
COUNSEL OF RECORD
277 Park Avenue
New York, New York 10172
212-407-2367
Counsel for the American Corporate Counsel Association

Of Counsel:

NANCY NORD
Executive Director
American Corporate Counsel Association
1225 Connecticut Ave., N.W.
Washington, D.C. 20036

SEPTEMBER 25, 1987

MOTION FOR LEAVE TO FILE BRIEF FOR THE AMERICAN CORPORATE COUNSEL ASSOCIATION AS *AMICUS CURIAE*

Pursuant to Rule 36 of the Rules of this Court, the American Corporate Counsel Association ("ACCA") requests leave to file the accompanying brief as *amicus curiae* in support of the Petition for a Writ of Certiorari. The attorneys for petitioner have consented to the filing of this brief. Consent has been denied by the attorneys for respondents.

ACCA is a national bar association devoted exclusively to the professional activities of attorneys on the legal staffs of corporations and other business organizations that are in the private sector or have private sector attributes (referred to as "employed counsel"). With 29 local chapters across the country, ACCA has approximately 7500 members employed in a legal capacity by some 3000 organizations. Many of these members are the chief legal officers of their clients.

It is estimated that between 30,000 and 60,000 members of the Bar are employed by business entities. In addition, ACCA estimates that over 20% of the more than 600,000 members of the bar in the United States (at least 120,000 lawyers) provide some form of legal service to corporate entities whether as "employed" counsel on the payroll of a particular business entity or as a member or associate of a law firm which has been "retained" by the business entity. (Collectively, they are referred to as "corporate counsel.")

In their professional activities, members of ACCA and other corporate counsel, using their experience and legal training, are regularly called upon to provide advice to their corporate clients on a wide variety of matters which require judgments and insights that are uniquely legal. As such, corporate counsel are intimately involved, *inter alia*, in formulating company policy on

compliance with regulatory matters, in advising management on pending and threatened litigation, and on the extent and nature of disclosure requirements.

The holdings of the courts below directly and materially impact the ability of corporate counsel to provide legal advice to their clients. Due to the direct impact of such decisions on the professional activities of corporate lawyers, ACCA seeks to place in focus the importance of the issues raised by this petition as they uniquely affect corporate counsel.

The Court should issue a writ of certiorari so that the contours of the attorney-client privilege and the attorney work product doctrine may be better defined. Such a definition would provide necessary guidance to corporate counsel on the extent to which their communications will be protected from unwarranted intrusions.

For the foregoing reasons, the motion of the American Corporate Counsel Association for leave to file the accompanying brief as *amicus curiae* in support of the petition should be granted.

SEPTEMBER 25, 1987

Respectfully submitted,

CARL D. LIGGIO
COUNSEL OF RECORD
277 Park Avenue
New York, New York 10172
212-407-2367
Counsel for the American
Corporate
Counsel Association

Of Counsel:
NANCY NORD
American Corporate Counsel Association
1225 Connecticut Ave., N.W.
Washington, D.C. 20036

No. 87-326

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

G.D. SEARLE & CO., PETITIONERS

V.

DEBRA A. AND GEORGE SIMON, RESPONDENTS

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE AMERICAN CORPORATE COUNSEL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

CARL D. LIGGIO
COUNSEL OF RECORD
277 Park Avenue
New York, New York 10172
212-407-2367
Counsel for the American Corporate Counsel Association

Of Counsel:

NANCY NORD
Executive Director
American Corporate Counsel Association
1225 Connecticut Ave., N.W.
Washington, D.C. 20036

SEPTEMBER 25, 1987

TABLE OF CONTENTS

	Page
INTEREST OF THE *AMICUS CURIAE*	1
INTRODUCTION	3
THE BACKGROUND	4
ARGUMENT	5
A. THE ROLE OF CORPORATE COUNSEL	5
B. THE LITIGATION CONTEXT	10
C. THE POLICY ISSUES WHICH NEED BE ADDRESSED	11
D. REASONS FOR GRANTING THE PETITION	13
CONCLUSION	15

TABLE OF AUTHORITIES

CASES

Bowsher v. Merck & Co., 460 U.S. 824 (1983) 12 n. 13

Cipollone v. Liggett Group, No 87-5014 (3d Cir. June 8, 1987) 10 n. 8

Coleman v. American Broadcasting Cos., 106 F.R.D. 201 *(D.D.C. 1985)* 8 n. 5

Decker v. Harper & Row Publishers, Inc., 400 U.S. 348 (1971) 3 n. 2

Federal Open Market Comm. v. Merrill, 443 U.S. 340 (1979) 12 n. 13

Federal Trade Comm'n v. Grolier Inc. 462 U.S. 19 (1983) 3 n. 2, 12 n. 13

Fischer v Kletz, 266 F. Supp.180 (S.D.N.Y. 1967) 9 n. 6

Goldberg v. United States, 425 U.S. 93 (1976) 4 n. 2

In re Grand Jury Witness (Salas), 695 F.2d 359 (9th Cir. 1982) 8 n. 5

In re Interstate Hosiery Mills, 4 S.E.C. 706 (1939) 7 n. 3

In re LTV Sec. Litig., 89 F.R.D. 595 (N.D. Tex. 1981) 13 n. 17

Pike v. Frank G. Hough, 2 Cal 3d 465, 85 Cal. Rpts. 629, 467 P.2d 229 *(1970)* 9 n. 6

SCM Corp. v. Xerox Corp., 70 F.R.D. 508 (D. Conn.), *appeal dismissed*, 534 F.2d 1031 (2d Cir. 1976). 13 n. 17

SEC v. Bangor Punta Corp., 331 F. Supp. 1154 (S.D.N.Y. 1971), *cert. denied*, 414 U.S. 924 (1973) 7 n. 3

Shelton v. American Motors Corp., 805 F.2d 1323 (8th Cir. 1986) 8 n. 5

Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985) 9 n. 6

Sporck v. Peil, 759 F.2d 312 (3d Cir.), *cert. denied*, 106 S. Ct. 232 (1985) 8 n. 5

The T.J. Hooper, 60 F.2d. 737 (2d Cir. 1932) *cert. denied*, 287 U.S. 662 8 n. 6

Union Carbide Corp. v. Travelers Indem. Co., 61 F.R.D. 411 (W.D. Pa. 1973) 13 n. 16

Upjohn Co. v. United States, 449 U.S. 383 (1981) 3 n. 2, 13 n. 18

RULES AND REGULATIONS

FED. R. CIV. P. 26(b)(3) 12 n. 4

FED. R. EVID. 407 9 n. 7

REGULATION S-X, 17 C.F.R. § 210.1-01 *et seq.* 7

OTHER AUTHORITIES

1986 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS. 11 n. 11

Bacus, Liability: Trying Times, NATION'S BUSINESS, February, 1986 10 n. 10

FINANCIAL ACCOUNTING STANDARDS BOARD OPINION NO. 5. 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

NO. 87-326

G.D. SEARLE & CO., PETITIONERS

v.

DEBRA A. AND GEORGE SIMON, RESPONDENTS

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF FOR THE AMERICAN CORPORATE COUNSEL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

As *amicus curiae*, the American Corporate Counsel Association ("ACCA") supports the petition for certiorari and respectfully urges the Court to issue a writ of certiorari.

INTEREST OF THE *AMICUS CURIAE*

ACCA is a national bar association devoted exclusively to the professional activities of attorneys on the legal staffs of corporations and other business organizations that are in the private sector or have private sector attributes (referred to as "employed counsel"). With 29 local chapters across the country, ACCA has approximately 7500 members employed in a legal capacity by some 3000 organizations. Many of these members are the chief legal officers of their clients.

It is estimated that between 30,000 and 60,000 members of the Bar are employed by business entities. In addition, ACCA estimates that over 20% of the more than 600,000 members of the bar in the United States (at least 120,000 lawyers) provide some form of legal service to corporate entities whether as "employed" counsel on the payroll of a particular business entity or as a member or associate of a law firm which has been "retained" by the business entity.

In their professional activities, members of ACCA and other corporate counsel, using their experience and legal training, are regularly called upon to provide advice to their corporate clients on a wide variety of matters which require judgments and insights that are uniquely legal. As such, corporate counsel are intimately involved, *inter alia*, in formulating company policy on compliance with regulatory matters, in advising management on pending and threatened litigation, and on the extent and nature of disclosure requirements.

The holdings of the courts below directly and materially impact the ability of corporate counsel to provide legal advice to their clients. Due to the direct impact of such decisions on the professional activities of corporate lawyers, ACCA seeks to place in focus the importance of the issues raised by this petition as they uniquely affect corporate counsel.

INTRODUCTION

Corporate counsel[1] provide a broad spectrum of legal advice on a daily basis to the business entities they serve. The nature and extent of that advice remains the same regardless of whether the lawyer is "employed" or "retained." The very purpose of this advice is, *inter alia*, to provide the business entity with the information necessary to comply with applicable laws and regulations, to take the legal steps necessary to protect its interests, to adjust business policy and practice in response to legal considerations and, when in litigation or faced by a risk of litigation, to provide an appropriate response. No business entity can function today without the input of its lawyers. To the extent any court decision erodes (as this case does here) or expands the traditional protections afforded by the attorney-client privilege or attorney work product doctrine, it has widespread implications.

Due to the increasing dependence on the legal function by business, it is important that definitive guidance be provided on the scope and application of both the attorney-client privilege and the attorney work product doctrine as they apply to the myriad of communications involving corporate counsel.[2]

---

[1] Although ACCA was formed to address the professional needs of employed counsel, the issues presented by this petition relate not just to inside (employed) counsel, but also directly impact the professional responsibility of outside (retained) counsel. In this brief we collectively refer to "corporate counsel" to designate those members of the bar who primarily practice corporate law and serve the business interests of their clients regardless of the nature of their retention or association.

[2] During the past decade this Court has addressed the work product doctrine only twice -- in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), and *Federal Trade Comm'n v. Grolier Inc.* 462 U.S. 19 (1983) -- and, other than in *Upjohn*, has not addressed issues concerning the attorney-client privilege since its *per curiam* affirmance in *Decker v. Harper & Row Publishers, Inc.*, 400

The instant petition provides an opportunity for the Court to further refine the contours of both the attorney-client privilege and the attorney work product doctrine in the business context. Although the instant case demonstrates only one facet of this interrelationship, its significance is far broader than the factual context in which it arises. Thus the legal implications of the decision below are potentially far reaching and ACCA urges this Court to grant the Writ of Certiorari.

THE BACKGROUND

Petitioner G.D. Searle & Co. ("Searle"), a Delaware corporation, is or has been a defendant in over 480 product liability claims relating to the copper intrauterine contraceptive device known as the CU–7 IUD. At some point after being served with a complaint, Searle's corporate counsel prepares a case analysis for that case. These analyses include, *inter alia*, the estimated future cost in defending the case and any estimated exposure. The analyses were also used to determine settlement strategies.

The case analyses were provided to Searle's Risk Management group where they were aggregated. The information was not generally disseminated, and Searle took precautions to be sure that unauthorized persons did not have access to this highly confidential information prepared by its corporate counsel.

Plaintiffs in the CU-7 litigation sought production of all case analyses -- both for each individual case and the aggregate of all the individual cases. The trial court did not order production of the individual case analyses because it found they were protected by the attorney-work product doctrine. However, it found that what was protected individually from discovery was not protected in the aggregate and ordered production of the aggregate analyses. The

---

U.S. 348 (1971). *Cf. Goldberg v. United States*, 425 U.S. 93 (1976) (work product doctrine considered in the context of the Jencks Act).

Eighth Circuit concurred with the district court that the individual case analyses were exempt from disclosure, but nevertheless, through a convoluted form of reasoning and over a strong dissent, allowed plaintiffs access to the aggregation of these analyses. *Simon v. G.D. Searle & Co.*, 816 F.2d 397 (8th Cir. 1987). On petition for rehearing *en banc*, the Eighth Circuit split 5 to 5. The petition for writ of certiorari followed.

ARGUMENT

The ability of management to effectively satisfy its legal obligations and to undertake prudent management practices is circumscribed by its ability to obtain the input and advice of legal counsel. In some of these matters, only a lawyer can provide the necessary information and judgment. For example, in evaluating the merits of a particular claim -- both for its possible success or failure as well as the future costs associated with such a claim -- only corporate counsel can provide that information (as Searle's counsel did here). Without corporate counsel's input, management would be unable to make prudent business decisions on whether, and for how much, it should settle a claim, to determine its contingent liabilities, or to predict with any level of accuracy its future cash flow needs with respect to such a claim or group of claims.

Any intrusion into the relationship between the corporate counsel and the client raises significant policy issues. The effect of the decision below is to create those sorts of intrusions which have far-ranging, adverse implications. Accordingly, this Court should issue a writ of certiorari to clarify for both the lower courts and counsel the contours of the attorney-client privilege and attorney work product doctrine.

A. THE ROLE OF CORPORATE COUNSEL

Societal and business relations have reached such a level of complexity today that many transactions entail legal considerations.

In addition, notwithstanding recent attempts at deregulation, business must operate in a substantially increased regulatory framework. For example, the level of federal government regulation has increased dramatically in the past three decades. Since the 1950s, when there were only a few federal agencies (*e.g.*, SEC, IRS, FTC) whose regulatory responsibility was likely to affect most corporations, the number of agencies with regulatory oversight which has grown dramatically. Today the number of federal agencies with broad regulatory responsibilities which have been created in the past three decades (*e.g.*, OSHA, EEOC, DOE, FEC, etc.) is a multiple of the number in existence in the 1950s. Moreover, many of these agencies have been replicated at the state level. Thus, business must be advised by lawyers.

Corporate counsel's role in advising business involves many different aspects. At the core of each of them, however, is bringing to bear uniquely legal judgments and insights. These may range, for example, from advising a business about compliance with regulatory requirements, to evaluating and defending threatened and actual claims against the business entity. How those uniquely legal judgments are translated into corporate policies and responses varies depending on the nature of the advice given and the context in which it is given.

For example, corporate counsel's involvement in the litigation process is not limited to defending a particular claim before a court or administrative agency; they also play a critical role in determining how a litigation impacts a company's other legal responsibilities. Corporate counsel must also provide management with an assessment of the risk that a particular claim has for the company so that management may plan its future cash needs as they will be impacted by the claim itself (should judgment be rendered against it or the claim settled) as well as the costs of defending such a claim.

These judgments also enhance management's ability to satisfy its disclosure obligations under the securities laws and with respect to the presentation of the company's financial statements. For example, in the preparation of a company's financial statements, for which management has the prime responsibility,[3] a company should accrue, or "set up," reserves sufficient to cover the expected costs of each claim unless, in management's judgment, the likelihood of loss is remote, non-quantifiable, or immaterial. FINANCIAL ACCOUNTING STANDARDS BOARD OPINION NO. 5. These accounting obligations are also embodied in the Federal Securities laws. *See, e.g.*, Regulation S-X, 17 C.F.R. § 210.1-01 *et seq.*

Accordingly, if a company does not properly establish reserves for litigation because it failed to obtain adequate input from its lawyers, it could face future liabilities to both shareholders and the Securities & Exchange Commission under the securities laws, or to creditors who might go unpaid if the initial litigation involves risks of such proportion as to threaten the continued viability of the entity.[4]

Similarly, for management to plan its cash flow needs, it must evaluate both the risk of the claim itself and the future expense associated with each particular claim. Estimates of future costs in defending such litigation are the product of legal strategies which counsel determine. Among other items, these estimates reflect deposition and document production strategies, whether and to what extent experts will be employed, and the nature and extent of motion practice. Thus, this evaluation is peculiarly within the

---

3 *See In re Interstate Hosiery Mills*, 4 S.E.C. 706, 721 (1939); *SEC v. Bangor Punta Corp.*, 331 F. Supp. 1154, 1163 (S.D.N.Y. 1971), *cert. denied*, 414 U.S. 924 (1973)

4 *E.g.*, consider the impact of the Dalkon Shield litigation on A.H. Robins.

province of the lawyer and entails substantial legal judgments and privileged concerns. The quantification of these legal judgments, if known by an adversary, provides invaluable insights to opposing counsel in formulating counter strategies and can create an unfair advantage.

The calculation of the potential loss resulting from a case or the future legal costs in the defense of a case are, in reality, merely a financial quantification of complex legal strategies reflecting the lawyer's work product.[5] These calculations also reflect a lawyer's advice to his client about the matters being handled by him. The fact that its format has changed -- *i.e.*, it may not appear in the rubric that is commonly considered the format of legal advice -- does *not* alter its underlying nature.

Corporate counsel's role in providing legal input to the business planning process does not stop with evaluating the financial impact of a claim or series of claims. To the extent a claim is not aberrational, it can provide significant learning for the business entity in its product development or in the types of standards which will govern the entity's future conduct.[6] Thus, to

---

5 As such they are no different than the decisions of counsel on what to ask a prospective witness, what to show a witness in preparing the witness to testify, or what documents to review prior to any document production. These communications and activities has been found to be protected either by the work product doctrine (*see, e.g., Shelton v. American Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986), *Sporck v. Peil*, 759 F.2d 312 (3d Cir.), *cert. denied*, 106 S. Ct. 232 (1985)), or the attorney-client privilege (*see, e.g., In re Grand Jury Witness (Salas)*, 695 F.2d 359 (9th Cir. 1982); *Coleman v. American Broadcasting Cos.*, 106 F.R.D. 201 (D.D.C. 1985)). The courts have traditionally recognized the sanctity of these activities and have insulated them from disclosure to one's adversaries.

6 It has long been recognized that compliance with existing standards will not necessarily insulate a defendant from a finding of negligence. *See The T.J. Hooper*, 60 F.2d. 737 (2d Cir. 1932) *cert. denied*, 287 U.S. 662. Thus, the law

the extent that the litigation provides information as to business practices (*e.g.*, product safety and development), the lawyers' input and reflections can be, and usually are, invaluable.[7]

All of these issues necessarily involve legal insights and judgments which are peculiarly within a lawyer's province. Prudent management must seek these insights and act upon them accordingly. Management and its counsel should not be deterred by a fear that this uniquely legal input will be open to discovery and that such discovery will lead to economic loss at the hands of adversaries in litigation. Corporate counsel's responsibility to provide these judgments and views in a professional manner should never be tempered by the risk that they might be required to be disclosed. Particularly this should be the case when that revelation might have a devastating impact on counsel's client in either that or some other proceeding.[8] These communications have been and

---

has led to the change in product standards (*see, e.g., Pike v. Frank G. Hough*, 2 Cal 3d 465, 85 Cal. Rpts. 629, 467 P.2d 229 (1970) (backup buzzers installed on trucks as a result of this decision)), business conduct (*see, e.g., Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985) (director's standard of care changed)), and even professional standards (*see, e.g., Fischer v Kletz*, 266 F. Supp.180 (S.D.N.Y. 1967) (accounting profession adopted Statement on Auditing Procedure No. 47 relating to subsequent events to comply with the holding)).

7 Effective management will ask its lawyers to provide "lessons we have learned" from the litigation to help prevent future problems. These inputs obviously reflect a combination of legal and business judgments -- but they are derived primarily from a legal setting. The legal inputs take on the characteristic of "product improvement" and have a salutary effect on society. As such, they are the *sine qua non* of "subsequent remedial measures." *Cf.* FED. R. EVID. 407 (remedial measures inadmissible). Before disclosure of these judgments is allowed, the impact of a policy allowing such discovery should be carefully evaluated.

8 As Searle's petition notes (at pp. 16-17), plaintiffs in mass tort litigation sell the information obtained in discovery, as here, to other plaintiffs in related litigation. Moreover, the plaintiffs' bar usually coordinates mass tort and

should continue to be afforded the traditional attorney-client and work product protections.

B. The Litigation Context

Not surprisingly, the issue of disclosure of these uniquely legal communications and views is only likely to arise in the context of litigation. Accordingly, the importance of defining the contours of the protections to be afforded legal consultations is highlighted by the increasing volume of business-oriented litigation.[9] In 1986, over 254,828 suits were filed in the federal courts -- a 41% increase since 1981.[10] Of these, more than 161,000, or 62%, involved

---

related litigation through national steering committees which take on the aura of a corporate entity, but are not burdened by the possibility of discovery imposed on a corporate entity. Moreover, the routine trading of this information among plaintiffs apparently has the imprimatur of the courts. *See, e.g., Cipollone v. Liggett Group*, No 87-5014 (3d Cir. June 8, 1987).

9 To the extent that the Eighth Circuit's holding was predicated on the fact that Searle's business involves litigation and therefore this impliedly negates the right to the application of the traditional protection from disclosure accorded an attorney's activities, the increasing volume of litigation would lead to the conclusion that no legal communication is entitled to protection. Moreover, the *a fortiori* conclusion that courts may draw from this aspect of the Eighth Circuit's opinion is that any legal advice given by counsel may lose the traditional protections afforded counsel's communications and activities.

10 During the period 1978 to 1983, 12,000,000 lawsuits (an average of 2,000,000 a year) were filed in state courts. Bacus, Liability: Trying Times, NATION'S BUSINESS, February, 1986, at 24. Information published by the National Center for State Courts suggests that the volume of litigation in the state court systems is increasing and that the numbers of suits involving claims above minimal jurisdictional levels is far in excess of 2,000,000 a year. Although no meaningful national statistics are available for state courts showing the type of suits filed therein, it is expected that a substantially lower percentage of the state court actions are business-related. Nevertheless, the number of business-related suits in state courts is significant.

business -- a 72% increase since 1981.[11] In all of these matters, corporate counsel's involvement is likely to be present at many different levels -- from advice and consultation prior to the start of litigation, through intimate involvement in the litigation process, to reflections following conclusion of the legal process.

C. THE POLICY ISSUES WHICH NEED BE ADDRESSED

In defining the contours of both the attorney-client privilege and the attorney work product doctrine and when discovery

---

[11] More than half of the suits filed in federal court involved business issues or business and were thus likely to involve corporate counsel. The business-related suits cover the entire panoply of business activities. It appears that the number of commercial, *i.e.*, business related suits breaks down as follows:

	1981	1986
Total Suits Brought	180,576	254,828
Contracts	51,159	88,352
Tort - Commercial	10,000	29,000
Statutory		
Antitrust	1,352	877
Civil Rights	15,419	19,000
Commerce	1,080	922
Labor	9,300	12,600
Patent, *et al.*	4,027	5,681
Securities	1,768	3,059
Other	-	2,000
Total Suits Brought	94,105	161,491
% of Suits Involving Business	52%	63%

1986 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS. (Due to the imprecision of some of the statistics, certain of the above numbers such as torts - commercial and civil rights are estimates.)

will be allowed, there are numerous policy issues which should be considered. These considerations include:

- whether the material sought is relevant to the issues;[12]
- whether the concept of "fundamental fairness"[13] is impinged by allowing an opposing party access to counsel's thoughts about a particular piece of litigation or its advice to management in general;
- whether the information sought is available from other sources;[14]
- whether production of the requested data is likely to have an adverse public impact without any material countervailing benefit for the party to whom it is produced;[15]

---

12 Here the Eighth Circuit implicitly found that the material was not relevant when it noted it was unlikely the material would be admissible. *See* Petitioner's Brief for Cert., at App. 15.

13 This Court has long considered "fundamental fairness" a touchstone in determining the extent of allowable discovery. *See, e.g., Federal Open Market Comm. v. Merrill*, 443 U.S. 340, 359-60 (1979); *Bowsher v. Merck & Co.*, 460 U.S. 824, 836, 846 (1983); *Federal Trade Comm'n v. Grolier Inc.*, 462 U.S. 19. 32 (1983).

14 FED. R. CIV. P. 26(b)(3) provides in pertinent part that work product is available "only upon a showing that the party seeking discovery has a substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent materials by other means." We note in passing that neither the court of appeals or the district court appeared to require the plaintiffs to make the requisite showing of "substantial need".

15 For example, if reserve information is likely to be disclosed, will management even develop that information. Moreover, will the production such in-

- whether reserve information is opinion or fact;[16]

- whether legal advice loses its characteristic (and protection) if used for business purposes.[17]

The opinions below failed to fully consider any of these issues in evaluating the contours of both the attorney-client privilege and the attorney work product doctrine. Rather, the courts below attempted to make a mechanical analysis of the question without regard to the proper policy considerations affecting the disclosure of the information at issue. Thus, the court below failed to adequately consider the far reaching implications of their decisions.

D. Reasons for Granting the Petition

The opinion of the Eighth Circuit below opens a wide door through which unwarranted intrusions into the attorney-client privilege and attorney work product doctrine can easily be made. The implications of this decision are far-reaching and, unless appropriate boundaries are established with respect to these intrusions, the reasoning underlying the Eighth Circuit's opinion can create an exception which will swallow the protections traditionally afforded and required by the privilege and doctrine.[18]

---

formation encourage more litigation and add to the *in terrorem* affect of litigation.

16 *See, e.g., Union Carbide Corp. v. Travelers Indem. Co.*, 61 F.R.D. 411, 413 (W.D. Pa. 1973) (opinions and conclusions with respect to reserves carried should not be discoverable).

17 *See, e.g., In re LTV Sec. Litig.*, 89 F.R.D. 595, 601 (N.D. Tex. 1981); *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 517 (D. Conn.), *appeal dismissed*, 534 F.2d 1031 (2d Cir. 1976).

18 To the extent *Upjohn* confirmed the principle that the work product doctrine is applicable to corporate counsel's activities, the opinion below has the potential to sharply curtail its application.

The opinion below raises serious issues as to the ability of management to protect the communications it receives from corporate counsel when it calls upon its legal advisors to provide uniquely legal considerations as an essential underpinning for formulating business policy and management planning. It poses substantial questions as to the scope and nature of the protected advice corporate counsel can and must provide to the business entity. Moreover, it directly affects what corporate counsel can and cannot say to management about litigation without fear of exposing those communications to the prying eyes of opposing counsel.

Unless corporate counsel can definitively measure the definitional boundary of legal advice, that advice will be unduly guarded when and if it is even provided. This Court has the opportunity to provide substantial guidance to lower courts, as well as corporate counsel, on the contours of the privileges and protection to be afforded communications of corporate counsel in a business context. In view of the potential for serious erosion of protection caused by the Eighth Circuit's holding below and the importance of the issue to the corporate bar, the Court should review this case.

CONCLUSION

We respectfully urge the Court to accept the petition for certiorari; to consider the need of business entities in having unfettered access to its legal advisers without fear that this advice will be subject to discovery and a weapon for its adversaries; and to provide a workable standard for the application of the attorney-client privilege and attorney work product doctrine in the context of the increasingly large volume of litigation involving business entities.

Dated: September 25, 1987

Respectfully submitted,

CARL D. LIGGIO
COUNSEL OF RECORD
277 Park Avenue
New York, New York 10172
212-407-2367
On Behalf of the American
Corporate Counsel Association

Of Counsel:

NANCY NORD
Executive Director
American Corporate
Counsel Association
1225 Connecticut Ave., N.W.
Washington, D.C. 20036